TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 52.

SALLIE FIELD SCOTT, ELIZA MADISON SCOTT, HARRIETT B. JONES, ET AL., APPELLANTS,

vs.

LIZZIE W. CAREW, W. W. HAMPTON, E. R. GUNBY, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED JUNE 6, 1904.

(18,988.)

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UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1902, and held in the court room of said court, in the city of New Orleans, before the Honorable Don A. Pardee, the Honorable A. P. McCormick; and the Honorable David D. Shelby, United States circuit judges for the fifth judicial circuit.

SALLIE FIELD SCOTT ET AL., Appellants,
versus
LIZZIE W. CAREW ET AL., Appellees. } No. 1160.

Be it remembered that heretofore to-wit: on the 3rd day of May, 1902, a transcript of the record of the above styled cause from the circuit court of the United States for the southern district of Florida, was filed in the office of the clerk of said United States circuit court of appeals for the fifth circuit, in the words and figures following, to-wit:

1 In the Circuit Court of the United States for the Southern District of Florida. In Chancery.

SALLIE FIELD SCOTT, ELIZA MADISON SCOTT, HARRIETT B. JONES, Freeman Jones, Lucia Beverly Bernard, Hugh S. Morrison, Hackley Morrison, Maria Hackley, Mary Hackley, Sallie Hackley, Mary F. Hackley, Sallie Strachan Hackley, Alexander S. Hackley, Gertrude Hackley, and Stephen P. Hackley, Complainants,
versus
LIZZIE W. CAREW, W. W. HAMPTON, E. R. GUNBY, M. G. GIBBONS, M. M. Nelson, E. B. Beach, S. Y. Finley, and George W. Hall, Defendants.

Bill of Complaint.

Counsel for complainants:
Fleming & Fleming, Jacksonville, Florida.
Wm. H. & George H. Lamar, Washington, D. C.
Munford & Anderson, Richmond, Virginia.

2 In the Circuit Court of the United States for the Southern District of Florida. In Chancery.

SALLIE FIELD SCOTT, ELIZA MADISON SCOTT, HARRIET B. JONES, Freeman Jones, Lucia Beverly Bernard, Hugh S. Morrison, Hackley Morrison, Elizabeth Madison Morrison, Maria Hackley, Mary Hackley, Sallie Hackley, Mary F. Hackley, Sallie Strachan Hackley, Alexander S. Hackley, Gertrude Hackley, Thomas H. Hackley, and Stephen P. Hackley

versus

LIZZIE W. CAREW, W. W. HAMPTON, E. R. GUNBY, M. G. GIBBONS, M. M. Nelson, E. C. Beach, S. Y. Finley, and George W. Hall.

To the honorable judges of the circuit court of the United States for the southern district of Florida:

Sallie Field Scott, a widow, a citizen of the State of Virginia, residing in Orange county, in said State; Eliza Madison Scott, a widow, a citizen of the State of Virginia, residing in Powhatan county, in said State; Harriet B. Jones and Freeman Jones, her husband, citizens of the State of Virginia, residing at Petersburg, in said State; Lucia Beverly Bernard, a widow, a citizen of the State of Virginia, residing at Petersburg, in said State; Hugh S. Morrison, a citizen of the State of Virginia, residing at Richmond, in said State; Hackley Morrison and Elizabeth Madison Morrison, citizens of the State of Virginia, residing at Richmond, in said State, infants under the age of twenty-one years, who sue by their next friend, Hugh S. Morrison, a resident of the same city, and a citizen of the same State; Maria Hackley, widow of Robert J. Hackley, deceased, a citizen of the State of California, residing at San Francisco, in said State; Mary Hackley and Sallie Hackley, citizens of the State of California, residing at San Francisco, in said State, infants under the age of twenty-one years, who sue by Mary Hackley, their mother and next friend, also a resident of the same city, and a citizen of the same State; Mary F. Hackley, widow of Alexander S. Hackley, deceased, a citizen of the State of New York, residing at Brooklyn, in said State; Sallie Strachan Hackley, a citizen of the State of New York, residing at Brooklyn, in said State; Alexander S. Hackley, a citizen of the State of New York, residing at Brooklyn, in said State; Gertrude Hackley, Thomas H. Hackley and Stephen P. Hackley, citizens of the State of

3 New York, residing at Brooklyn in said State, infants under the age of twenty-one years, who sue by Mary F. Hackley, their duly qualified and acting guardian and next friend, who is also a citizen of the same State, and resident of the same city, bring this, their bill of complaint, against Lizzie W. Carew, a widow, a citizen of the State of Florida, residing at Tampa, in said State; W.

W. Hampton, a citizen of the State of Florida, residing at Gainesville, in the county of Alachua, in said State; E. R. Gunby and M. G. Gibbons, M. M. Nelson, E. C. Beach and S. Y. Finley and George W. Hall, all citizens of the State of Florida, residing at Tampa, in said State.

And thereupon your complainants complain and say that this suit is brought to determine the ownership of certain real property located in the county of Hillsboro, in the State of Florida, hereinafter particularly described; that the value of said property is more than the sum of five thousand dollars, and that the determination of the rights of the parties hereto in said property involves the construction of certain statutes of the United States, to-wit:

An act of Congress approved March 30th, one thousand eight hundred and twenty-two, entitled, "An act for the establishment of a territorial government of Florida" (3 Stats. 654); and the acts referred to therein, so far as the same may be applicable; An act approved April twenty-second, one thousand eight hundred and twenty-six, entitled "An act giving the right of pre-emption in the purchase of lands to certain settlers in the States of Alabama and Mississippi, and the Territory of Florida" (4 Stats. 154); and all acts referred to therein so far as the same may be applicable;

An act approved August eighteenth, one thousand eight hundred and fifty-six, relative to military reservations in the State of Florida, entitled, "An act making appropriation for certain civil expenses of the government for the year ending June thirtieth, one thousand eight hundred and fifty-seven."

An act approved July fifth, one thousand eight hundred and eighty four, entitled, "An act to provide for the disposal of abandoned and useless military reservations."

And your complainants further represent the following state of facts:

That heretofore, to-wit: in the year 1845, one Robert J. Hackley died intestate, leaving surviving him as his sole heirs at law, the following named children, to-wit:

I. Sallie Field Hackley, one of the complainants herein, who inter-married with one John Wychliffe Scott, and who survived him, a citizen of the State of Virginia, residing in Orange county in said State;

4 II. Eliza Madison Hackley, one of the complainants herein, who inter-married with one Edwin Scott, and who survived him, and who is now a citizen of the State of Virginia, residing in Powhatan county, in said State.

III. Lucia Beverly Hackley, who inter-married with one Morrison, who died before his said wife, who has since died, leaving surviving her as her sole heirs at law the following named children, to-wit:

1. Harriet B. Morrison, who inter-married with one Freeman Jones, and who with her husband are complainants herein, said State.

2. Lucia B. Morrison, who inter-married with D. M. Bernard, now dead, and thereby became Lucia B. Bernard, one of the complainants herein, a citizen of the State of Virginia, residing at Petersburg, in said State.

3. Hackley T. Morrison, who died intestate, leaving surviving him as his sole heirs at law the following children, to-wit:

(*a.*) Hugh S. Morrison, one of the complainants herein, a citizen of the State of Virginia, residing at Richmond, in said State.

(*b.*) Hackley Morrison, one of the complainants herein, a citizen of the State of Virginia, residing at Richmond, in said State, being an infant, sues by Hugh S. Morrison, his next friend, one of the complainants herein, also a citizen of said State, and resident of said city.

(*c.*) Elizabeth Madison Morrison, one of the complainants herein, a citizen of the State of Virginia, residing at Richmond, in said State, who, being an infant, sues by Hugh S. Morrison, one of the complainants herein, her next friend, also a citizen of said State and a resident of said city.

IV. Robert J. Hackley, who died intestate, leaving surviving him as his sole heirs at law, and distributees, Maria Hackley, his widow, one of the complainants herein, a citizen of the State of California, residing at San Francisco, in said State, and the following named children, to-wit:

(1.) Mary Hackley; and

(2.) Sallie Hackley, complainants herein, both of whom are citizens of the State of California, and reside at San Francisco, in said State, and being infants, sue by Maria Hackley, their mother and next friend, complainants herein she being also a citizen of the same State, and residing in the same city.

V. Alexander S. Hackley, who died intestate, leaving as his sole heirs at law, and distributees, Mary F. Hackley, his widow, one of the complainants herein, a citizen of the State of New York, residing at Brooklyn, in said State, and the following named children, to-wit:

(1.) Sallie Strachan Hackley;

(2.) Alexander S. Hackley;

(3.) Gertrude Hackley;

(4.) Thomas H. Hackley; and

(5.) Stephen P. Hackley, complainants herein, all of whom are citizens of the State of New York, residing at Brooklyn, in said State, the last three of whom are infants and sue by Mary E. Hackley, their duly qualified and acting guardian and next friend, complainants herein, she being also a citizen of said State, and a resident of said city.

And your complainants state that the foregoing are the sole descendants and heirs at law of the said Robert J. Hackney, deceased.

Your complainants further show that about the month of November, 1823, the said Robert J. Hackley, who was then over twenty-one years of age, and the head of a family, settled, inhabited and culti-

vated a certain tract of land, situated on the east side of Hillsboro river at its confluence with the eastern arm of Tampa bay, sometimes known as Hillsboro bay, in what was then the Territory, now the State, of Florida; that the tract of land so settled upon, inhabited and cultivated is the land now known as lots number 8, 9 and 10, section 24, township 29, south, range 18 east; lot number 16, section 18, and lots numbered 12, 13 and 14, section 19, township 29 south, range 19 east, in the State of Florida, in what is now Hillsboro county, containing about one hundred and forty-eight and 11/100 (148 11/100) acres; that the said Hackley took with him thereon his family, cattle, hogs, poultry and agricultural implements, and in good faith established his home thereon; that he erected on said lots 9 and 10 of said tract a substantial dwelling and other buildings; that at the time that said Hackley settled upon said land, it was a dense wilderness, far removed from civilization, his only companions being Indians, alligators, panthers and wolves; that said land was not rightfully claimed by *and* (any) other person on or before the 22nd day of April, 1826, that neither said Hackley nor any one claiming through him, has ever claimed any tract of land in said Territory or State of Florida, by virtue of a confirmation of any commissioners or by virtue of any act of Congress; that the said Hackley remained upon said land until he was dispossessed by the troops of the United States, as will be hereinafter set forth, and continued to reside in the Territory and State of Florida until his death in 1845.

6 Your complainants further show that in the month of February, in the year 1824, a detachment of United States troops sent to the southern portion of the Territory of Florida, under the command of Colonel George M. Brooke, in connection with certain Indian troubles then existing, located a camp or cantonment upon said tract of land which was then inhabited and cultivated by said Hackley, as aforesaid, and took possession of the house and land so occupied, inhabited and cultivated by said Hackley, as will more fully appear from copies of affidavits of James Gadsden, commissioner, etc.; J. B. Benjamin, George M. Brooke, Robert J. Hackley and Lorenzo Thomas, filed herewith, marked Exhibits "A," "B," "C," and "D," respectively, and prayed to be read as a part of this bill; that said troops continued to occupy said camp or cantonment until December 10th, 1830, when by an executive order of the President of the United States, the Fort Brooke military reservation was established, containing sixteen square miles of land, and embracing the above mentioned tract which had been settled and improved in 1823 and 1824 by said Robert J. Hackley, as aforesaid; that said reservation was from time to time reduced by executive orders until it embraced on June 1st, 1878, only the above described tract of land, containing 148 11/100 acres, commonly known as the "Reduced Fort Brooke military reservation," which reservation was relinquished and transferred by the Secretary of War to the Interior Department on January 4th, 1883, in accordance with the provisions

of the laws of the United States, as will be hereinafter more fully set forth.

Your complainants further show that on March 30th, 1822, the Congress of the United States passed an act entitled "An act for the establishment of a territorial government in Florida" (3 Stats. 654), by which it was provided that all public laws of the United States not repugnant to the provisions of said act, should extend to and have full force and effect in the said Territory; that subsequent thereto, to-wit: on March 3rd, 1823, Congress passed an act authorizing the President of the United States to establish a land office in each of the districts of East and West Florida as soon as in the opinion of the President there was a sufficient quantity of public lands surveyed in either of said districts to authorize the opening of one or both of said land offices (3 Stats. 750); that subsequent thereto, by act of Congress approved April 22nd, 1826 (4 Stats. 154), entitled "An act giving the right of pre-emption in the purchase of land to certain settlers in the State- of Alabama, Mississippi and Territory of Florida," it was provided:

7 "That every person, or the legal representative of any person, who being either the head of a family, or twenty-one years of age, did, on or before the first day of January, in the year one thousand eight hundred and twenty-five, actually inhabit and cultivate a tract of land situated in the Territory of Florida, which tract is not rightfully claimed by any other person, and who shall not have removed from said Territory, shall be entitled to the right of pre-emption in the purchase thereof, under the same terms, restrictions, conditions, provisions and regulations, in every respect as are directed by the act entitled "An act giving the right of pre-emption in the purchase of lands to certain settlers in the Illinois Territory, passed February 5th, one thousand eight hundred and thirteen; provided that no person shall be entitled to the provisions of this section who claimed any tract of land in said Territory by virtue of a confirmation of the commissioners, or by virtue of any act of Congress."

That the terms, restrictions, conditions, provisions and requirements of the act of February 5th, 1813, referred to in said act of April 22nd, 1826, are contained in section 2 of said act of February 5th, 1813, which reads as follows:

"That every person claiming a preference in becoming the purchaser of a tract of land in virtue of this act, shall make known his claim by delivering a notice in writing to the register of the land office for the district in which the land may lie, wherein he shall particularly designate the quarter section he claims, which notice the register shall file in his office on receiving twenty-five cents from the person delivering the same. And in every case where it shall appear to the satisfaction of the register and receiver of public moneys of the land office that any person who has delivered his notice of claim is entitled according to the provisions of this act to a preference in becoming the purchaser of a quarter section of land,

such person so entitled shall have a right to enter the same with the register of the land office on producing his receipt from the receiver of public moneys for at least one-twentieth part of the purchase money, as in the case of other public lands sold at private sale: provided that all lands to be sold under this act shall be entered with the register at least two weeks before the time of the commencement of the public sales in the district wherein the land lies; and every person having the right of preference in becoming the purchaser of a tract of land, who shall fail so to make his entry with the register within the time prescribed, his right shall be for-
8 feited, and the land by him claimed shall be offered at public sale with the other public lands in the district to which it belongs."

Your complainants allege that their decedent, the said Robert J. Hackley, having actually settled upon, inhabited and cultivated the tract of land in the Territory of Florida, hereinbefore mentioned, before the 1st of January, in the year 1825, as required by the provisions of the said act of April 22nd, 1826, and not having removed from said Territory, acquired by virtue of said act a vested right of pre-emption in the purchase of said land whenever the same should be open to entry, which said right could only be forfeited by the failure of the said Robert J. Hackley, or his legal representatives, to comply with the provisions and conditions of the act of February 5th, 1813.

Your complainants show that the said Robert J. Hackley and his representatives, your complainants, as aforesaid, have complied with all of the terms, restrictions, conditions, provisions and regulations of the said acts of April 22nd, 1826, and February 5th, 1813, so far as they are applicable to this case, and have used the greatest possible vigilance and the utmost care to protect and preserve their rights in said land, as will hereinafter more fully appear.

Your complainants show that the land office at St. Augustine, Florida, in which jurisdiction the land in controversy was located, was first established by an executive order in 1828, under authority of the act of March 3rd, 1823, aforesaid, that at the time of the establishment of said land office, and for a long time thereafter the hostility of the Indian tribes rendered communication between said land office and that portion of Florida wherein the said Hackley resided, practically impossible; that as soon as practicable after the establishment of said land office, to-wit: in the year 1835, although the said lands had not then been surveyed, the said Hackley filed with the register of said land office evidence designating the tract of land, which had been settled, inhabited and cultivated by him as aforesaid, among other things, the affidavits hereinbefore mentioned as Exhibits "A," "B," "C," and "D," and claimed the right of pre-emption in the purchase thereof, under and by virtue of said act of April 22nd, 1826; that subsequent thereto, by change of boundary lines of the land districts of Florida, the said land came within the jurisdiction of the local land office at Newnansville, Florida, where-

upon, on November 27th, 1843, the said Hackley secured from the register of the land office at St. Augustine, Florida, certified copy of the evidence formerly filed in the said land office in support
9 of his claim to the right of pre-emption in the purchase of said land, and filed the same, together with a notice of said claim, with the register of the land office at Newnansville, Florida, of which notice the following is a copy.

"TALLAHASSEE, *Nov.* 27, 1843.

"SIR: You will please take notice that I claim the right of pre-emption to the tract of land known as Cantonment Brooke, bay of Tampa, under the pre-emption act approved April 22, 1826, and that I have filed proof of the same in the register's office at St. Augustine.

"Very respectfully, your ob'd't serv't,

"R. J. HACKLEY.

"Register of the land office, at Newnansville, Fla."

That in the year 1845, the said Robert J. Hackley died at Tallahassee, Florida, having been a resident of said Territory and State continuously from the year 1823, the date of his settlement upon, inhabitation and cultivation of said land as aforesaid, to the date of his death; that from the death of said Hackley down to the present time, his legal representatives have continuously and persistently asserted their claim to the right of pre-emption in the purchase of said land, and have fully complied with all of the provisions and requirements of the laws of the United States with respect to the same.

And your complainants further show that, on September 26th, 1887, T. H. Randolph, the administrator of the estate of the said Robert J. Hackley, filed in the local land office at Gainesville, Florida, as such administrator, and on behalf of the legal representatives of said Hackley, a supplemental notice of the claim of the legal representatives of said Hackley to the right of pre-emption in the purchase of said land; that subsequent thereto, to-wit: on October 14th, 1887, said Randolph, administrator as aforesaid, executed before the register of the said land office at Gainesville, Florida, a further sworn statement reciting the claim of the legal representatives of the said Robert J. Hackley, to a right of pre-emption in the purchase of said land; that, on the same date, to-wit: October 14th, 1887, the said Randolph, administrator as aforesaid, filed in said land office his application to purchase said land on behalf of the legal representatives of said Robert J. Hackley, and tendered the purchase price therefor, in accordance with the laws of the United States; that said application and tender of the purchase price of said land were rejected and refused by the register and receiver of said land office, for reasons which will more fully appear by reference to cop-
10 ies of said sworn statement and said application, and the indorsements of the register and receiver thereon, filed herewith

marked Exhibits "E" and "F" and prayed to be read as a part of this bill of complaint.

Your complainants allege that they and their decedent, the said Robert J. Hackley, did make full compliance with all of the requirements of the laws of the United States with respect to their right of pre-emption in the purchase of said land, but that, disregarding the rights of your complainants, the officers of the Interior Department of the United States, while conceding that the said Robert J. Hackley did settle, inhabit and cultivate said land before January 1st, 1825, to-wit: in 1823 and 1824, as aforesaid, and that said Robert J. Hackley and his legal representatives did comply with all the requirements of the laws of the United States as aforesaid, yet held and decided as a matter of law that your complainants were not entitled to the right of pre-emption in the purchase of said land, for reasons which will hereinafter more fully appear.

Your complainants further show that, on January 4th, 1883, the said reduced Fort Brooke military reservation, which then embraced only the tract of land hereinbefore mentioned, was relinquished and transferred by the Secretary of War to the Interior Department; that, on March 16th, 1883, the General Land Office prepared and submitted to the local land office at Gainesville, Florida, a proof and diagram of the official survey of the said reduced Fort Brooke military reservation, which diagram was received at said local land office on the 22nd of March, 1883; that, on April 2nd, 1883, the Commissioner of the General Land Office telegraphed the register and receiver of the local land office at Gainesville, Florida, directing them to allow no entries upon any of the lands within the limits of said reservation; that, prior to the receipt of said telegram, certain persons hereinafter mentioned, had been allowed to enter and file for said lands, under the homestead and pre-emption laws, and certain other persons had applied to enter and file for said lands under said laws, which latter applications were rejected by said register and receiver, on account of prior entries and filings of record; that thereafter such proceedings were had that the Commissioner of the General Land Office acquired jurisdiction and on December 17th, 1883, said Commissioner considered the several applications for said land within the limits of said reservation, and rejected the same; that, on January 22nd, 1884, the Commissioner of the General Land Office held for cancellation homestead entry No. 11,637 of Edmund S. Carew, for lot No. 16, section 8; lots 12, 13 and 14, section 19, township 29,
11 south, range 19 east, and lots 8, 9, and 10, section 24, township 29 south, range 18 east, filed March 22nd, 1883; also pre-emption declaratory statement No. 564, filed by Clifford Herrick, on March 26th, 1883, for the land covered by said homestead entry, and the pre-emption filing No. 569 of Louis Bell, made March 30th, 1883, for the same land; that all the said parties duly appealed to the Secretary of the Interior, who, on March 16th, 1884, affirmed the decision of the Commissioner of the General Land Office; that, on April 30th, 1885, the acting Secretary of the Interior affirmed

the decision of the Commissioner of the General Land Office rendered June 13th, 1884, rejecting the application of Enoch B. Chamberlain to make homestead entry on lot No. 14 of the northwest quarter of the southwest quarter of section 19, township 29, south, range 19 east; that, on May 10th, 1887, the acting Secretary of the Interior considered the application of Daniel Mather to make pre-emption entry of lots 8, 9 and 10, section 24, township 29 south, range 18 east, lot 16, section 18, and lots 12, 13 and 14, section 19, township 29 south, range 19 east of said tract, under the act of Congress approved July 5th, 1884, and rendered a decision in which the pre-emption claim of said Daniel Mather was allowed; that, on May 17th, 1889, the Secretary of the Interior reconsidered his decision of May 10th, 1887, allowing the pre-emption claim of Daniel Mather, as aforesaid, and ordered that a hearing be had by the register and receiver of the local land office at Gainesville, Florida, to determine the rights of the various claimants to said land.

And your complainants show that such proceedings having been had that said register and receiver acquired jurisdiction, said hearing was duly had before them, at which the following claimants to said tracts of land were allowed to present their claims and to submit evidence in support thereof, namely: Daniel Mather, S. W. Carew, Andrew Stillings, Joel B. Myers, Richard Nash, G. W. Kirby, Frank C. Thomas, Henry W. Beach, John H. Havans, Julius Ceasar, Frank Jones, Mrs. E. S. Carew, Louis Bell, W. B. Henderson, Clifford Herrick, E. B. Chamberlain, Wirt C. Myers, Marion M. Nelson the heirs of Robert J. Hackley, deceased, and the mayor and city council of the city of Tampa; that, after considering the evidence submitted on behalf of each of the claimants, the register and receiver of said land office, on December 10th, 1889, rendered their joint decision rejecting the filings and entries and the claims of each and all of said claimants, as being speculative and otherwise illegal, except the claims of the heirs of Robert J. Hackley and Louis Bell; that
12 said register and receiver found "that Hackley made entry in good faith and for the purpose of securing a home," and decided that the claim of his legal representatives was superior to any other claim to said tract of land; but the said register and receiver declined to allow the legal representatives of said Robert J. Hackley to make entry upon said land for the reason that "since the date of the transfer by the Secretary of War of the reduced Fort Brooke military reservation to the Interior Department, no published notice has been given to the people that the land embraced within the reservation would be opened to pre-emption or homestead entry," as required by the act of July 5th, 1884.

Your complainants further show that appeals were duly taken by all of the said claimants from the decision of said register and receiver of the local land office to the Commissioner of the General Land Office, who having acquired jurisdiction, considered said appeals and rendered his decision thereon, on December 10th, 1890, by which said decision he expressly approved and adopted the find-

ing of facts made by said register and receiver, and upon the question of law, deciding that the claim of the legal representatives of said Hackley "is fully protected by the acts of 1826 and 1858, and the act of July 5, 1884;" that said Commissioner also held that sixty (60) days' publication was not required by law before said land could become subject to entry by the legal representatives of said Hackley, and rejected each and every claim of said tract of land and to each subdivision thereof, with the exception of the claim of legal representatives of said Robert J. Hackley who were allowed to perfect entry upon said land under section 2269 of the Revised Statutes of the United States; all of which will more fully appear from a copy of the opinion of said Commissioner filed herewith, marked "Exhibit G," and prayed to be read as a part of this complaint.

Your complainants further show that appeals were duly taken from said decision of the Commissioner of the General Land Office to the Secretary of the Interior by Daniel Mather, the City of Tampa, the heirs of Louis Bell, deceased, W. B. Henderson, Lizzie W. Carew, Julius Caesar, Frank Jones, E. B. Chamberlain and Martha Lewis, alias Martha Stillings; that, on November 25th, 1892, the Secretary of the Interior, having acquired jurisdiction, considered said appeals, and rendered his decision thereon; that in said decision the said Secretary of the Interior approved the findings of fact as made by the register and receiver and the Commissioner of the General Land Office as aforesaid, but held as a matter of law that the legal
13 representatives of the said Hackley had no valid claim to the said land under acts of 1807, 1813, 1822 and 1826, and that any claim the said Hackley may have had under the laws of the United States could not be asserted by his said legal representatives; all of which will more fully appear by reference to a copy of said decision of the Secretary of the Interior, filed herewith, marked "Exhibit H," and prayed to be read as a part of this complaint.

Your complainants further show that all the parties in interest, to-wit: Daniel Mather, the City of Tampa, the heirs of Louis Bell, deceased, W. B. Henderson, Julius Caesar, Frank Jones, E. B. Chamberlain, Martha Lewis, alias Martha Stillings, and the said heirs of Robert J. Hackley, deceased, filed before the Secretary of the Interior motions for a review and reconsideration of said decision; that the Secretary of the Interior having jurisdiction, reviewed and reconsidered said decision of November 25th, 1892, and rendered his decision upon such reconsideration and review on July 24th, 1894, by which latter decision the said Secretary of the Interior, while approving the findings of the facts, as originally made by the register and receiver and the Commissioner of the General Land Office insofar as the claim of the legal representatives of said Robert J. Hackley was concerned, again rejected the claim of said legal representatives of Robert J. Hackley, deceased, to the right of pre-emption in the purchase of said land, upon conclusions of law, which will more fully appear by reference to a copy of said decision of July 24th, 1894, filed herewith, marked "Exhibit J," and prayed to be read as

a part of this complaint; that the said Secretary of the Interior by his said decision of July 24th, 1894, awarded the right to enter upon said land embraced in said reduced Fort Brooke military reservation, to the following parties, all of whose claims arose subsequent to the 23rd day of March, 1883.

To the heirs of E. S. Carew, deceased: Lots 9 and 10, section 24, township 29, south, range 18 east, containing fifty-nine and 93/100 (59.93) acres.

To the heirs of Louis Bell, deceased: Lot 8, section 24, township 29, south range 18 east, containing sixteen and 73/100 (16.73) acres.

To Julius Caesar: Lot 13, section 19, township 29, south, range 19 east, containing twenty-two and 51/100 (22.51) acres.

To Martha Stillings (now Turner), widow and heir of Andrew Stillings, deceased: Lot 12, section 19, township 29, south, range 19 east, containing ten and 29/100 (10.29) acres.

To Frank Jones: Lot 16, section 18, township 29, south range 19 east, containing sixteen and 40/100 (16.40) acres.

14 To E. B. Chamberlain: Lot 14, section 19, township 29, south, range 19 east, containing twenty-two and 25/100 (22.25) acres.

That on September 9th, 1895, under authority of said decision of the Secretary of the Interior, rendered on July 24th, 1894, Lizzie W. Carew, claiming to be the widow of E. S. Carew, deceased, was permitted by the register and receiver of the land office at Gainesville, Florida, to make final commutation homestead entry No. 10,060, for the lands awarded to the heirs of said E. S. Carew, deceased, as aforesaid; that said entry was duly approved for patent by the Commissioner of the General Land Office, on July 29th, 1896, and that a patent thereon was duly issued by the United States to Edward S. Carew, on July 30th, 1896, for lots 9 and 10, section 24, township 29, south, range 18 east.

Your complainants further show that subsequent to the issuance of said patent to Edward S. Carew, for lots 9 and 10, section 24, township 29, south, range 18 east, as aforesaid, James W. Bilbie, and numerous other citizens of Hillsboro county, Florida, residents upon lands in said county, which were formerly a part of said Fort Brooke military reservation, filed in the Department of the Interior of the United States, a petition praying that a suit be instituted by the United States to set aside and annul the patents issued for the lands contained in said reduced Fort Brooke military reservation, for fraud in the procurement thereof, among which patents so sought to be set aside was the patent issued to said Edward S. Carew, as aforesaid, that after said petition had been pending for a long time before said Department the Secretary of the Interior finally rendered his decision thereon on the 8th day of March, 1898, declining to request the Department of Justice to institute proceedings to set aside said patents, for reasons which will more fully appear from a copy of said opinion filed herewith, marked "Exhibit K," and prayed to be read as a part of this complaint.

Your complainants further show that Edward S. Carew died intestate in the year 1886; that Lizzie W. Carew, one of the defendants herein, is the widow and the sole heir at law and distributee of said Edward S. Carew, deceased; that said Lizzie W. Carew as said heir at law and distributee of Edward S. Carew, acquired the legal title to all of said lots Nos. 9 and 10, section 24, township 29, south, range 18 east, under and by virtue of said patent issued by the United States Government to said Edward S. Carew for said lots on July 30th, 1896, as aforesaid.

15 That said Lizzie W. Carew, well knowing the rights of your complainants in the premises, and with intent to injure your complainants and to defeat their said rights, entered upon and took possession of said lots before the issuance of said patent to Edward S. Carew, as aforesaid, and that on October 4th, 1895, (many months before the issuance of said patent), said Lizzie W. Carew executed a pretended deed of conveyance to W. W. Hampton, one of the defendants herein (whom your complainants are informed and allege was counsel for Lizzie W. Carew in the prosecution of her claim to said land before the Interior Department), by which deed said Carew undertook to convey to said Hampton an undivided one-third interest in said lots 9 and 10, section 24, township 29, south, range 18 east, for a named consideration of one hundred dollars. Said deed being recorded in Hillsboro County, Record Book L. I. page 574.

That on May 20th, 1896 (several months before the issuance of said patent), said Lizzie W. Carew executed a pretended deed of conveyance to J. H. Williams and W. W. Williams (who your complainants are informed and allege are brothers of said Lizzie W. Carew), by which the said Lizzie W. Carew undertook to convey to said J. H. and W. W. Williams, an undivided two-thirds interest in said lots Nos. 9 and 10, section 24, township 29, south, range 18 east, for a named consideration of forty thousand ($40,000) dollars, said deed being recorded in Hillsboro County Record Book T. I., page 253.

That on June 1st, 1896, said W. W. Hampton executed his pretended deed of conveyance to said J. H. Williams and W. W. Williams (in which his wife joined), thereby undertaking to convey to said pretended grantees for a named consideration of one dollar, an undivided one-third interest in all of said lots 9 and 10, section 24, township 29 south, range 18 east, except the following described tract, to-wit: Beginning at the north east corner of Government lot No. 9, and running south 844.3 feet, thence west to low water mark of Hillsboro river; thence in a north westerly direction to an intersection with the north boundary line of said Government lot 9, thence in a north easterly direction along the north boundary line of said lot 9 to place of beginning, which said deed is recorded in Hillsboro County Record Book M. I., page 174.

That on June 4th, 1896, said J. H. Williams and W. W. Williams executed a pretended deed of conveyance (in which their wives joined) to said W. W. Hampton, by which the said Williams and

Williams undertook to convey to said Hampton an undivided two-thirds interest in all that portion of said lots 9 and 10, section
16 24, township 29, south, range 18 east, in which said Hampton, in his deed of June 1st, 1896, aforesaid, had undertaken to reserve an undivided one-third interest, being the following described tract: Beginning at the north east corner of Government lot 9, and running thence south 844.3 feet; thence west to low water mark on the Hillsboro river, thence in a north westerly direction to intersection with the north boundary line of said Government lot 9, thence in a north easterly direction along the north boundary line of said lot 9, to place of beginning containing 13.77 acres; reserving, however, the extension and continuation of Franklin street and Florida avenue, as they are now laid out in the city of Tampa, across the lands conveyed, said deed being recorded in Hillsboro County Record Book, T. I. page 405; the purpose of said pretended deeds from said Hampton to said J. H. Williams and W. W. Williams, and from said J. H. and W. W. Williams to said Hampton, being, as your complainants are advised and allege, to partition said lots between said parties.

That on June 4th, 1896, said J. H. Williams and W. W. Williams, executed their pretended deed of mortgage (in which their wives joined), by which they undertook to mortgage to the aforesaid Lizzie W. Carew to secure a pretended indebtedness of fifty thousand ($50,000) dollars, all of said lots 9 and 10, section 24, township 29 south, range 18 east, except the above described tract reserved in the above mentioned deed of June 1st, 1896, from W. W. Hampton to said J. H. Williams and W. W. Williams, and also excepting five acres in the southeast corner of Government lot No. 10, fronting 210 feet on Hillsboro bay, said deed of mortgage being recorded in Hillsboro County Record Book B. I., page 192. And your complainants are advised and allege that the five acres so reserved from said mortgage was the same land afterwards conveyed by said Williams and Williams to Nelson, Beach and Finley, defendants herein, as will be hereinafter more fully set forth.

That on June 4th, 1896, said J. H. Williams and W. W. Williams, executed their joint pretended deed of conveyance (in which their wives joined), by which they undertook to convey to M. M. Nelson, one of the defendants herein, for a named consideration of one dollar one and one-half acres of said Government lot 10, generally described as follows: Beginning at a point 423.41 feet south of the northeast corner of Government lot 10, running thence west 204.02 feet, thence north 320.26 feet, thence east 204.02 feet, thence south
17 320.26 feet to the point of beginning, the tract so undertaken to be conveyed, being a portion of that part of said Government lot 10 reserved from said mortgage from said J. H. and W. W. Williams to Lizzie W. Carew, as aforesaid; said deed being duly recorded in Hillsboro County Record Book U. I., page 240.

That on June 27th, 1896, said J. H. and W. W. Williams, executed their pretended deed of conveyance (in which their wives joined),

by which they undertook to convey to E. C. Beach, one of the defendants herein, for a named consideration of one dollar, two acres of said Government lot 10, generally described as follows: Beginning at northeast corner of Government lot 10, thence south 743.67 feet for a starting point, thence south 402.16 feet, thence along the shore of Hillsboro bay, in southwesterly direction, 210 feet, thence north 451.88 feet, thence east 204.02 feet to place of beginning; the tract so undertaken to be conveyed being a portion of that part of said lot 10 which was reserved from the mortgage executed by said J. H. and W. W. Williams to Lizzie W. Carew as aforesaid, said deed being recorded in Hillsboro County Record Book, M. I., page 242.

That on June 27th, 1896, said J. H. and W. W. Williams executed their pretended deed of conveyance (in which their wives joined), by which they undertook to convey to S. Y. Finley, one of the defendants herein for a named consideration of one dollar, one and one-half acres of Government lot 10, generally described as follows: Beginning at a point 743.67 feet south of northeast corner of Government lot 10, and running thence west 204.02 feet, thence north 320.26 feet, thence east 204.02 feet, thence south 320.26 feet to place of beginning; the tract so undertaken to be conveyed being the remainder (after the conveyance to Nelson and Beach aforesaid) of that part of said lot 10 which was reserved from the mortgage executed by said J. H. and W. W. Williams to Lizzie W. Carew, as is hereinbefore set forth, said deed being recorded in Hillsboro County Record Book, M. I., page 302.

That on March 7th, 1896, W. W. Hampton and wife, M. E. Hampton and wife and Lizzie W. Carew, executed their joint pretended deed of conveyance by which they undertook to convey to George W. Hall, one of the defendants herein, for a named consideration of five thousand dollars one and one-half acres more or less of said tract of land generally described as follows:

Begin at that part or portion of lot 9, sec. 24, T. 29 S. R. 18 E. in former Fort Brooke military reservation, bounded by lines
18 described as follows: Beginning on the northern boundary of said lot 9, which line is the south line of Whiting street of the city of Tampa at the point of intersection, produced by west line of Franklin street, city of Tampa, with said north boundary line (said point of beginning being also on a corner N. 63 degrees E. and distant three feet from east side of the trun-ion of a certain iron gun situate on said street and boundary line) and from said described beginning point, run S. 22 degrees east on the produced west line of Franklin street, 142.7 feet to N. E. corner of land hereby conveyed; thence deflecting 94 degrees 10 minutes to the right to a course S. 72 degrees 10 minutes W. and running thereon 134.4 feet to a corner, thence deflecting 18 degrees 16 minutes course S. 53 degrees 54 minutes west and running 76.7 feet to N. W. corner of a tract, thence deflecting left 73 degrees 12 minutes (course S. 21 degrees E.) and running 309 feet to S. W. corner of tract; thence deflecting left 100 degrees 30 minutes (course N. 58 degrees E.) and running thence

221.4 feet to S. E. corner of tract, thence deflect left 100 degrees (course N. 22 degrees W.) and run on west line of Franklin street 286 feet to N. E. corner of tract conveyed; said deed being duly recorded in Hillsborough County Record Book, T. I., page 481.

That on April 9th, 1897, said J. H. and W. W. Williams executed their pretended deed of conveyance (in which their wives joined) by which they undertook to convey to E. R. Gunby and M. G. Gibbons, defendants herein, (who, your complainants are informed and allege were attorneys and legal advisors of said Lizzie W. Carew) for a named consideration of one dollar, three acres of Government lot 10, generally described as follows: Beginning at the northeast corner of Government lot 10, and running thence west 204 feet to point of beginning of the land conveyed, thence south 311.1 feet to a corner, thence west 420 feet to a corner, thence north 311.1 feet to a corner and thence east 420 feet to a point of beginning, said deed being recorded in Hillsboro County Record Book "Z" 1, page 137.

That on May 7th, 1897, Lizzie W. Carew released the above described tract of land, conveyed by said J. H. and W. W. Williams to said E. R. Gunby, and M. G. Gibbons, as aforesaid, from the lien of the mortgage executed by said J. H. and W. W. Williams, to said Lizzie W. Carew on June 4th, 1896, as aforesaid, the named consideration for said release being the sum of one dollar, said release being recorded in Hillsborough County Record Book No. 4, page 1.

That on March 5th, 1900, J. H. and W. W. Williams exe-
19 cuted their quit claim deed (in which their wives joined) by which they undertook to reconvey to Lizzie W. Carew all their interest in and to Government lots 9 and 10 for a named consideration of one dollar, said deed being recorded in Hillsborough County Record Book L. 2, page 204.

Your complainants allege that the said Lizzie W. Carew one of the defendants herein claims title to all of said lots 9 and 10 section 24, T. 29 S. R. 18 E., (except the portions thereof conveyed to other defendants herein as aforesaid), as sole heir at law and distributee of said Edward S. Carew, patentee as aforesaid and under and by virtue of said pretended quit claim deed from J. H. Williams and W. W. Williams executed as aforesaid; that said W. W. Hampton one of the defendants herein claimed title to all that portion of said lots 9 and 10 described and reserved in his said pretended deed to J. H. and W. W. Williams, dated June 1st, 1896, aforesaid, under and by virtue of said pretended deed of May 20th, 1896, from said Lizzie W. Carew to said Hampton, and said pretended deed of June 4th, 1896, from said J. H. Williams and W. W. Williams to said Hampton; and said Hampton now claims title under and by virtue of said pretended conveyances to all of said tract except so much thereof as was undertaken to be conveyed to said George W. Hall as aforesaid; that said M. M. Nelson, E. C. Beach, S. Y. Finley and E. R. Gunby and M. G. Gibbons, defendants herein, claim title to those respective portions of said tract of land described in the respective pretended deeds of conveyance from said J. H. and W. W. Williams to said

Nelson, Beach, Finley and Gunby and Gibbons, hereinbefore mentioned; that said George W. Hall claims title under and by virtue of said pretended deed of March 7th, 1896, from W. W. Hampton and wife, M. E. Hampton and wife, and Lizzie W. Carew to said Hall, to that portion of said tract of land described in said deed; and that all of said claims of said defendants are in violation of the rights of your complainants.

And your complainants charge that said pretended conveyances from said Lizzie W. Carew and said J. H. and W. W. Williams to said W. W. Hampton; from said Lizzie W. Carew and said W. W. Hampton to said J. H. Williams and W. W. Williams, from said J. H. Williams and W. W. Williams to said M. M. Nelson and to said E. C. Beach, and to said S. Y. Finley, and to said E. R. Gunby and M. G. Gibbons, and from said W. W. Hampton and wife, M. E. Hampton and wife, Lizzie W. Carew to said George W. Hall, executed as aforesaid were made without real, legal, or valuable consideration, and that the same were conclusive and made for the purpose of injuring your complainants and defeating their rights in said land; and that all of the parties to said pretended conveyance, both grantors and grantees, were and have been at all times fully advised and had full knowledge of the illegal and invalid character of said pretended conveyances and of the rights of your complainants in the premises.

And your complainants charge that the said Lizzie W. Carew, W. W. Hampton, M. M. Nelson, E. C. Beach, S. Y. Finley, E. R. Gunby, M. G. Gibbons and George W. Hall, have with intent to injure and oppress your complainants, and to defeat the rights of your complainants in the premises, made and executed alleged and pretended conveyances purporting to convey certain portions of said lots Nos. 9 and 10, section 24, T. 29, S. R. 18 east, to divers persons as yet to your complainants unknown, but whose names your complainants pray when discovered they may have leave to insert herein as defendants and parties to this suit should they be advised that it is necessary or proper so to do, with proper and sufficient words to charge them with the premises; that all the parties to said alleged and pretended conveyances, both the alleged grantors and the alleged grantees, were and have been at all times fully advised and have had full knowledge of the rights and interests of your complainants in said tract of land.

Your complainants allege that they are now, and have been at all times ready and willing to pay the Government price of said lands, with all necessary and proper expenses which were required by law, in order to perfect their rights therein, and your complainants herewith tender and offer to pay to the defendants the Government price of said land, together with proper expenses and other charges, as may be adjudged by this honorable court to be right.

For as much as your complainants are the equitable owners of said land, and are without adequate relief except in a court of equity where such matters are properly cognizable, and to the end that the

defendants may make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of their knowledge, remembrance, information and belief, full, true and perfect answer make to the matters hereinbefore stated and charged, but not under oath, answer under oath being hereby expressly waived, your complainants pray:

That this honorable court will take jurisdiction of this suit and properly construe and interpret the acts of Congress hereinbefore mentioned, so far as the same may be applicable to this case.

21 That said defendants be decreed to hold the legal title of said land in trust for your complainants.

That proper decrees be entered requiring said defendants, upon payment by your complainants of the Government price of said land, and such further and reasonable charges as this court may find to be just and right, to convey said land to your complainants.

And that such further and general relief may be granted to your complainants as their case may require, and to equity may seem meet.

That a writ of subpœna of the United States of America may issue directed to said Lizzie W. Carew, W. W. Hampton, M. M. Nelson, E. C. Beach, S. Y. Finley, E. R. Gunby, M. G. Gibbons, and George W. Hall, commanding them on a day certain, to appear and answer to this bill of complaint, and to abide and perform such orders and decrees in the premises as to this honorable court shall seem proper and required by the principles of equity and good conscience.

FLEMING & FLEMING,
WM. H. LAMAR,
GEO. H. LAMAR,
MUMFORD & ANDERSON,
Complainant's Solicitors.

EXHIBIT A.

TERRITORY OF FLORIDA, }
County of Leon. }

Be it known that before me, Thomas M. Bradford, justice of the peace, in and for the county aforesaid, personally appeared James Gadsden, who being duly sworn on his oath deposeth, that some time in the latter part of the year 1823, or the early part of the year 1824, he was at the bay of Tampa and there witnessed a settlement made, as he was informed, by a Mr. Hackley, known as Mr. Robert Hackley, the applicant in this case. Mr. Rhodes was the resident, and acknowledged himself as the agent of the said Hackley, who had gone to Pensacola on some private business, and who the deponent understood did subsequently return to said settlement. The improvements made on the public land by said Hackley is the identical spot subsequently selected by Gen'l Geo. Brooke of the

U. S. Army, who, together with the deponent, was appointed by the Government of the U. S. for said purpose, as a site for the erection of a cantonment, known as Cantonment Brooke on the bay
22 of Tampa. Of the cultivation of the land near said improvement the deponent knoweth nothing.

(Signed) JAMES GADSDEN.

Sworn to and subscribed before me, this 27th day of August, 1834.

THOMAS M. BRADFORD, *J. P.*

EXHIBIT B.

TERRITORY OF FLORIDA, }
County of Hillsborough. }

Be it known that before me, Augustus Steele, judge of the county court of the county of Hillsborough, personally appeared Josiah B. Benjamin, and after being first duly sworn, on his oath saith, that in the year 1824 he knew Robert J. Hackley to reside upon and cultivate in his own right a certain tract of land, situate, lying and being on the east side of the Hillsborough river at its confluence with the eastern arm of Tampa bay, in Florida (then sometimes known as Hillsborough bay).

That the said Robert J. Hackley, did build on said tract of land, and on the place subsequently the site of the military garrison, known as Cantonment Brooke, a frame house of superior style and quality for a new country, which deponent understood the said Hackley imported from New York for the purpose of erecting and occupying on the said land, and that he had at the same period sundry implements of industry, together with hoes, spades, plough and also cows, oxen, poultry, hogs, etc., which he had brought with him for the purposes aforesaid.

Deponent further says, that the said Robert J. Hackley continued in the occupation of said place and cultivated said land, until some time in the month of March, in the year 1824, when he was compelled to leave his said possession and improvements by Colonel Brooke of the U. S. Army, who then established the garrison before mentioned on the tract of land then occupied by the said Hackley.

(Signed) J. B. BENJAMIN.

Sworn to and subscribed before me this 1st day of October, 1834.

(Signed) AUGUSTUS STEELE,
Judge of the County Court of the County Aforesaid.

TERRITORY OF FLORIDA, }
County of Hillsborough. }

AT CHAMBERS, TAMPA, *Oct.* 1*st*, 1834.

I Augustus Steele, judge of the county court aforesaid, do
23 hereby certify that I have interrogated Josiah B. Benjamin, the affiant above named, in relation to his knowledge of the residence on and cultivation by Robert J. Hackley of a certain tract of land mentioned in the foregoing affidavit, in the year 1824, what buildings he erected, what implements of husbandry he had with him, and in regard to such other matters as might elicit the truth on the subject, and am satisfied that the statements in the foregoing affidavit are true.

In testimony whereof I have hereunto set my hand the day and year above written.

(Signed) AUGUSTUS STEELE.

EXHIBIT C.

TERRITORY OF MICHIGAN, }
County of Brown. }

Be it known that before me, a justice of the peace, in and for the county aforesaid, personally appeared George M. Brooke, who first being duly sworn, deposeth and saith, that in the latter part of the year A. D. 1823, or the early part of the year A. D. 1824, he was appointed by the Government of the United States, in conjunction with Colonel James Gadsden, of the Territory of Florida, deputed to select a site for the erection of a cantonment in the vicinity of Tampa bay in the said Territory of Florida; that he made a selection of the site, known subsequently as Cantonment Brooke; that in his selection Colonel Gadsden acquiesced; that the place selected was at that time occupied by the applicant in this case, Mr. Robert J. Hackley, and that he had erected upon it a comfortable dwelling house, and had the ground near it in cultivation.

(Signed) GEORGE M. BROOKE,
Bvt. Brigd. Gen'l, U. S. A.

Sworn and subscribed to before me H. S. Baird, a justice of the peace, this 27th day of November, A. D. 1834.

(Signed) HENRY S. BAIRD,
Justice of the Peace, Brown County, M. T.

EXHIBIT D.

TERRITORY OF FLORIDA, }
County of Leon. }

Be it known that before me, Leslia A. Thompson, judge of the county court of the county aforesaid, this day personally appeared the
24 subscriber, Robert J. Hackley, who being first duly sworn, on his solemn oath saith, that some time in the year one thousand eight hundred and twenty-three, he made an improvement, resided upon and cultivated a tract of land situate, lying and being in vicinity of Tampa bay, Territory aforesaid, that said tract of land is the identical spot subsequently selected by Gen'l Geo. M. Brooke of the U. S. Army, who in conjunction with Col. James Gadsden, of this Territory, was appointed by the Government of the United States for that purpose, as the site of what has since been known as the military encampment called Cantonment Brooke.

(Signed) R. J. HACKLEY.

Subscribed and sworn to this 9th day of February, A. D. 1835, before me.

(Signed) L. A. THOMPSON,
Judge of the County Court of Leon County.

EXHIBIT D. D.

TERRITORY OF FLORIDA, }
Jefferson County. }

Personally appeared before me, Williard Budd, a justice of the peace, in and for the county aforesaid, Lorenzo Thomas, who being duly sworn, deposeth and saith, that some time in November or December, eighteen hundred and twenty-three, Robert J. Hackley, brought from the city of New York, a frame dwelling house, together with cattle, poultry and agricultural implements, that he errected said dwelling house on a tract of land in the vicinity of Tampa bay, the identical spot subsequently selected as a site for what has since been known as the military encampment, called Cantonment Brooke; that he was then about twenty-five years of age; that he was the head of a family consisting of about sixteen hired white men; that he resided together with said family in said *family in said* dwelling house; that he cultivated a portion of the above described land, and that there was no other person residing on, or cultivating said tract of land at said time.

(Signed) L. THOMAS.

Sworn to and subscribed before me, this fifth day of December, 1843.

W. BUDD,
Justice of the Peace, Jefferson County, Territory of Florida.

25 EXHIBIT E.

I, Thos. H. Randolph, claiming the right of pre-emption and purchase as administrator of the estate of the late Robert Hackley, deceased, for the benefit of his heirs, under section one, acts of April 22, 1826, February 5th, 1813 and July 5th, 1884, to lots 8, 9, and 10, section 24 township 29 S., range 18 E., lot 16, section 18, lots 12, 13 and 14, section 19, township 29 S., range 19 E., containing 148 11/100 acres, subject to sale at the land office at Gainesville, Fla., do solemnly swear to the best of my knowledge and belief, that the said Robert J. Hackley never exercised his pre-emption right, and was in every respect a qualified pre-emptor under the said acts; that he settled upon, cultivated and otherwise improved the said land, not to sell the same on speculation, but in good faith to appropriate it to his own exclusive use or benefit, and that I as his administrator, have not directly or indirectly made any agreement or contract in any way or manner with any person or persons whomsoever, by which the title which I as administrator may acquire from the Government of the United States would inure in whole or in part to the benefit of any person, excepting myself as the administrator of his estate for the benefit of his heirs as aforesaid. And I hereby tender to the receiver of the land office at Gainesville, Fla., in lawful money of the United States, the Government price of said land, being at the rate of $1.25 per acre, together with the required Government fees.

(Signed) T. H. RANDOLPH, *Adm'r.*

EXHIBIT E, Cont'd.

I, S. C. Tucker, register of the land office at Gainesville, Fla., do certify that the above and foregoing affidavit was subscribed and sworn to before me on this 14th day of October, A. D. 1887.

(Signed) S. C. TUCKER, *Register.*

EXHIBIT F.

No. —. LAND OFFICE AT GAINESVILLE, FLA.,
October 14th, 1887.

I, Thomas H. Randolph, administrator of the estate of Robert J. Hackley, deceased, of Tallahassee, Leon county, Fla., do hereby apply to purchase the lots 8, 9, and 10, of sec. 24, tp. 29 S., of R. 18 E.;

lots 16 of sec. 18, and lots 12, 13, and 14, sec. 19, in tp. 29 S.,
26 of R. 19 E., consisting of 148.11 acres, according to the returns of the surveyor general, for which I have agreed with the register to give at the rate of one dollar and twenty-five cents per acre.

(Signed) T. H. RANDOLPH, *Adm'r.*

Indorsement on back of above application.

"Rejected, land applied for not subject to entry, being embraced in the Fort Brooke military reservation.

(Signed) S. C. TUCKER, *Register.*

October 14th, 1887.—Money tendered but refused for the reason that the application is rejected.

(Signed) JOHN T. CRAWFORD, *Receiver.*

EXHIBIT G.

DEPARTMENT OF THE INTERIOR, J. U. W.
GENERAL LAND OFFICE, E. C. S.
WASHINGTON, D. C., *December* 10, 1890. E. W. K.

Fort Brooke military reservation.

Register and receiver, Gainesville, Florida.

GENTLEMEN: I have before me for consideration the papers in the case of the Fort Brooke military reservation, transmitted by you on appeal form your decision of December 20, 1889.

The present case arose on a hearing ordered by letters "G," May 17th, and May 25, 1889. The record is voluminous, and it is noticed that several of the witnesses have omitted to sign their names to the testimony and that you omitted to affix the jurat thereto; the omissions, however, are not fatal, as all the material points in such testimony are repeated in other portions of the testimony.

The statement of the case, made by you in your decision, is as concise as it can well be made, and presents the facts brought out by the hearing so fully, that I have adopted the same and embody it as part of my decision.

You report that due notice was sent to Daniel Mather, S. W. Carew, Andrew Stillings, Joel B. Myers, Richard Nash, G. W. Kirby, Frank C. Thomas, Henry W. Beach, John S. Havens, Julius Cæsar,
27 Frank Jones, Mrs. E. S. Carew, Louis Bell, W. B. Henderson, Clifford Herrick, E. B. Chamberlain, Marion M. Nelson, Wirt S. Myers, heirs of R. J. Hackley, deceased, and the honorable mayor and city council of the city of Tampa, Florida.

On the day set for hearing all the parties named appeared by counsel and the investigation proceeded from day to day, until all

the parties in interest had concluded their testimony, and submitted their claims for final determination by the department.

"We deem it unnecessary to review at length the early history at Fort Brooke, from the fact that the question has been so long pending before the Interior Department and Congress that its history is generally known, and will therefore confine our report to the claims of the respective claimants and the evidence submitted in support of each.

"It is contended on behalf of the heirs of R. J. Hackley, deceased, that Hackley entered upon the land included in the Fort Brooke reservation in 1824, which was prior to the arrival of Col. Brooke and his command, six years previous to the order of General Jackson creating Fort Brooke as a military reservation; only five years from the date when the United States acquired title to the land by treaty with Spain, and 21 years previous to the admission of Florida into the Union as a State. It is claimed that this entry was made under the acts of Congress of 1813 and 1826, providing for the preemption of public lands, and that he continued in possession until the arrival of Col. Brooke and his command, when he was ordered off and compelled to abandon his home.

"The land selected by Col. Brooke as a military reservation was retained under the control of the U. S. Army until 1830, when General Jackson issued his order creating Ft. Brooke as a military reservation, and it appears from the *ex parte* statements on file that Mr. Hackley never relinquished or voluntarily abandoned his claim to the land. He at all times, up to the time of his death, contended that under the acts of 1813 and 1826 his prior right to purchase could not be questioned whenever the reservation became useless or abandoned by the military authorities. The letters on file in support of Mr. Hackley's claim show that Hackley moved to the Territory of Florida in 1824, when it was a dense wilderness, his only companions being the Indians, alligators, panthers and wolves, and that he dwelt upon the reservation for some time prior to the arrival of Col. Brooke. This seems to us to entitle his claim, or that of his heirs who shared with him the privations of a frontier life, to serious consideration, and believing that Hackley made entry in good faith,
and for the purpose of securing a home under the provisions
28 of the acts of 1813 and 1826, then in force we consider his
claim superior, in the absence of an adverse claim, to the claims made after the abandonment of the fort in 1883.

"It is our belief that the act of 1884 could not annul or destroy a right acquired over sixty years prior to the date of the passage of said act, and in as much as the widow and heirs of Hackley have continued to prosecute their claims for the right to purchase the abandoned reservation, we believe that their claim is entitled to serious consideration.

"Daniel Mather, with a man named A. Ross, went upon the reservation with no intention of making it their home, but by permission of the military authorities, for the purpose of carrying on the

business of bakers, and to supply the U. S. troops then on the reservation with bread. While the reservation was under the control of the Federal troops, Mather and Ross conducted the bakery business, supplying the troops and citizens of Tampa with bread, and not until the troops were removed from the reservation did Mather or Ross manifest any intention of making a permanent location upon the reservation.

"On April 14, 1883, Mather filed a declaratory statement for lot 16, sec. 18, and lots 12, 13 and 14, sec. 19, T. 29 S. R. 18 E., and for two years continued to reside upon the land, conducting the bakery business. He made but little improvements to the old Government building which, it is alleged, he purchased and made but little, if any, attempt to cultivate any portion of the land.

"It is clear from the evidence that Mather's declaratory statement was made in the joint interest of himself and Ross, and that Ross, who was the moneyed member of the firm, furnished the capital and was to share in the profits of the investment. We are clear in the opinion that Mather's declaratory statement was filed as a mere speculation in the joint interest of himself and Ross without intent on the part of either to locate permanently as a pre-emptor or homesteader on the land. In 1885 Mather and Ross abandoned the reservation and have since made their homes in Tampa.

"Edmon S. Carew, now deceased, made homestead entry No. 11,627 on March 22, 1883, for lot 16, sec. 18, and lots 12, 13 and 14, sec. 19, T. 29 S. R. 18 E., which entry was canceled May 24, 1884, as per your letter "G" of that date. It is clear from the evidence and papers on file that Carew, in making the entry, acted under the directions contained in a telegram sent him by Hon. Wilkinson Call, U. S. Senator, in which the Senator instructed Carew to draw on him for the entry fees.

29 "It appears from draft on file, marked Exhibit "K," and of which the following is a copy.

"$20. GAINESVILLE, FLA., *March* 22, 1883.

"Pay to the order of H. F. Dutton & Co. twenty dollars, value received, and charge the same to account of

E. S. CAREW.

To. Hon. Wilkinson Call, Nat'l Hotel, Washington, D. C.

that Carew on the same day that he made his homestead entry, made a draft upon Senator Call to pay the fees and commission required.

"On April 13, 1883, Carew removed from Gainesville and entered upon the land, taking possession of the abandoned barracks building, which it is alleged he purchased from W. B. Henderson, while the evidence shows that the building had been purchased and was owned at the time of Carew's entry upon the land by S. A. Jones, of Tampa.

"It is clear from the testimony of Leslie and others that Carew, in making the entry, was acting as the agent of Hon. W. Call, and as appears from the letters of Senator Call addressed to Hon. T. Leslie in the supposed interest of the people of Tampa. On reaching Tampa, however, Carew, believing that he had a fortune at his command, refused to recognize any arrangement offered him by the representatives of Senator Call and made known his intention to hold on to the entry and establish his homestead right. The burden of proof tends to show that it was the intention of Senator Call, in sending the telegram to Carew, that the latter should enter the land for the benefit and use of the city of Tampa, and not for his individual benefit. At the time of entry it is clearly evident that Carew was acting under the advice contained in the telegram, as he appeared at the land office in Gainesville on the arrival of the northern mail, and in five minutes after the receipt by the register of your letter of March 17, 1883, transmitting for the files of the office the approved diagram of the subdivision of the late Ft. Brooke reservation into lots, in sections 18 and 19, T. 29 S. R. 19 E., and section 24 T. 29, S. R. 18 E., relinquished by the Secretary of War to the Interior Department, Mr. Carew had completed his homestead filing.

"It is clear therefore, that Mr. Carew's filing was not made by him with intent, at the time, to make the land his homestead, and that he did not entertain any such intent until he entered upon the land in April, 1883, and discovered its real value. The evidence shows that there must have been some understanding between Carew and Leslie and others that a portion of the land homestead should be donated to the city of Tampa for a park, as requested by Senator Call, the remainder to be owned jointly by those on whom Senator Call had relied to act with him in the interest of the city of Tampa.

"Mr. Carew, however, went back on the agreement, holding that by reason of his homestead entry he was the individual owner of the land, and he therefore refused to make any concession or to comply with the request of Senator Call in regard to a park for Tampa.

"We are clear in the opinion that Carew did not make his homestead entry in good faith and with intent as required by law; that his only incentive in holding on to his claim was the opportunity for speculation; and that the same motive and incentive has controlled his widow in remaining upon the land since the death of her husband. To constitute a *bona fide* settler upon the public lands, the entryman must intend making the land homestead his or her permanent home; the entry must not be made for the purpose of speculation, neither can there be conniving with others to secure the land for purpose of joint or individual speculation.

"The evidence relating to the claim of Lewis Bell shows that he had resided on the reservation by permission of the military authorities, and that he had been faithful as a soldier for many years

and had now the esteem and confidence of the officers in charge of the post. In all the arrangements sought to be entered into by the city of Tampa, Mr. Leslie and others, in regard to the disposition of the reservation, the claim of Mr. Bell and his family to that portion of the land which he occupied and for which he filed declaratory statement March 30, 1883, never seems to have been questioned, owing to his military service, good character and the high esteem in which he was held by the officers and soldiers stationed at the fort and by the citizens of Tampa.

"We believe that the claim- of his wife and children are entitled to more consideration from the Government than any of the other claims filed in this case.

"In 1889 the legislature of the State of Florida granted to the two towns, then known as Tampa and North Tampa, a charter uniting them under one corporate head, to-wit: the city of Tampa. By the same act the corporate limits of Tampa were extended so as to include the Fort Brooke reservation. Under this amended charter the mayor and council claim that the city of Tampa is entitled to receive from the Government as a donation this reservation for the purpose of a park and for such other uses as the authorities of said city may deem necessary.

31 "It will be seen that the two towns that now comprise the city of Tampa were distinct corporations, whose corporate limits extended to the limits of Fort Brooke, but did not include any portion of the reduced reservation. By the legislative act of 1889 the two towns were merged in one, and the limits of the new corporation extended so as to include the whole of the reduced reservation.

It must be borne in mind that there is another incorporated town, known as Ft. Brooke, which adjoins the reservation. This town has a mayor, council and marshal, and is vested with equal corporate rights with the city of Tampa. It must be observed that on January 1st, 1883, *that* at the time of the passage of the act of Congress of July 5, 1884, the corporate limits of the town of Tampa, and North Tampa ran along the line of the Ft. Brooke reservation, and that the reservation lay contiguous to, but was not within, the corporate limits of the towns named, until 1889 when the two towns were merged in one and the new corporation extended so as to include the reservation.

The allegation that any considerable portion of the reduced Ft. Brooke reservation was used for trade or business is not sustained by the evidence.

It appears that a bakery and curiosity shop were conducted there, and that a small space was used for logging and lumber purposes, but that it was a place where trade or business to any considerable extent was, or is now carried on, is not supported by the testimony.

William B. Henderson made application November 27, 1883, to file Gerard scrip upon the lands embraced within the reduced Ft. Brooke reservation, which application was rejected by this office.

It is not clear that Gerard scrip can be located upon other than public lands already subject to entry and of the minimum value of $1.25 per acre.

We do not consider it necessary to review in detail the evidence adduced in support of the claims of Frank Jones, who filed declaratory statement April 5, 1883; Andrew Stillings, deceased, who filed declaratory statement April 25, 1883, Julius Cæsar, who made homestead entry September 22, 1887; Marian M. Nelson, who filed homestead application July 27, 1887; Wirt S. Myers, who filed declaratory statement September 8, 1887; Clifford Herrick, who filed declaratory statement March 26, 1883; Enoch B. Chamberlain, who made homestead application April 22, 1884; John S. Havens, who filed affidavit of settlement July 10, 1889; and George Kirby, who made pre-emption filing from the fact that it would be merely a
32 repetition of what has already been stated with reference to the other claims referred to at length.

"We purpose, briefly, to invite your attention to the several acts of Congress upon which action has heretofore been based.

"The act of August 18, 1856, provided that all public lands heretofore reserved for military purposes in the State of Florida, which lands, in the opinion of the Secretary of War, are no longer useful or desired for such purposes, or so much thereof as said Secretary may designate, shall be, and are hereby placed under the control of the General Land Office to be disposed of and sold in the same manner, and under the same regulations as other public lands of the U. S. Provided, that said land shall not be so placed under the control of the General Land Office, until the said opinion of the Secretary of War, giving his consent, communicated to the Secretary of the Interior, in writing, shall be filed and recorded.

This 6th section of the act of June 12, 1858, repealing all existing laws relative to the sale of military sites, contains the following proviso: That the provisions of the act of August 18, 1856, relative to certain reservations in the State of Florida, shall continue in force.

By sections 2257, 2258 and 2389, R. S. U. S., it is shown that Government reservations are not subject to pre-emption or homestead entry, they being regarded as a distinct class of the public domains after their relinquishment. After the passage of the act of June 12, 1858, Congress assumed to direct the disposition of relinquishment or useless reservations, and in some cases the appraisal and sale was under congressional direction.

It is claimed by the attorney for Julius Cæsar and other claimants, that the act of July 5, 1884, is conclusive and absolute in its terms, and that those who had entered upon the reservation prior to said July 5, 1884, are entitled to make homestead entry. This claim we do not consider valid, from the fact that the law requires certain formalities to be carried out before reserved lands are made subject to entry. By the act of July 5, 1884, it is provided that the lands shall be surveyed, subdivided, and each tract thereof to be appraised

by three competent and disinterested men appointed for that purpose by the Secretary of the Interior. The said act of July 5, 1884, contained a proviso to the effect that any settler who was in actual occupation of any portion of any such reservation, prior to the location of such reservations, or who settled thereon prior to January 1, 1884, in good faith, for the purpose of securing a home and
33 of entering the same under the general laws, and has continued in such occupation to the present time, and is by law entitled to make a homestead entry, shall be entitled to enter the land so occupied, it being further provided that said lands were subject to entry under the public land laws at the time of their withdrawal.

It is clear from the records of the local land office, that one at least of the essential requirements of the act of 1884 has not been complied with. Since the date of the transfer by the Secretary of War of the reduced Fort Brooke reservation to the Interior Department no published notice has been given to the people that the land embraced within the reservation would be open to pre-emption or homestead entry.

And believing that the provisions of said act, requiring 60 days' publication before the land becomes subject to private entry is mandatory and cannot be annulled, except by Congress, we consider that the land now retains the same status that it did on the date of its transfer from the War Department to the Interior Department; that it is not yet, and cannot be, until after due publication, made the subject of pre-emption or homestead entry, and that those who were upon the reservation prior to or on the 1st day of January, 1884, were there as squatters, having no legal claim or right to any portion of the land, the same not being subject to pre-emption or homestead entry until all the requirements of the law had been complied with and the land within the reservation duly declared open to disposition under the land laws.

We are not disposed to deny our sympathy for many of the poor men and women who, to better their condition, made entry upon the reservation and built humble homes in which they have dwelt for years in anticipation of being able to secure title to the land upon which they had squatted, but sympathy is subordinate to duty—sentiments must yield to the stern requirements of the law, and in the duty devolving upon us we have sought to act with equity towards all, enmity towards none.

"We therefore recommend that all claims now pending either contest, pre-emption or homestead, excepting the claims of the heirs of R. J. Hackley and Louis Bell, be canceled, and that such relief as may appear best in the judgment and within the authority of the department, be granted in the two excepted cases just above named."

The status of this tract was partially determined in the decision

of the department in the case of Daniel Mather, 5 L. D., 632,
34 wherein it was held that this land was subject to disposal under the act of July 5th, 1884, and that the rights of settlers thereon prior to January 1, 1884, are protected.

In the Mather case no adverse interest was brought to light, the sole question being his right to make entry, and the department then held that Mather is entitled to offer proof, and if in all respects qualified, may make entry, "provided there is no objection other than those discussed herein." The case before me, however, shows other objections of such a character as to preclude Mather from making entry. His alleged settlement on the land was entirely with the consent of the military authorities, and was such as to identify him with the cantonment. His subsequent removal from the tract to Tampa was an abandonment of all right he may have had by reason of his being on the land at the date of abandonment of the reservation. But more than this, there were rights that had attached far earlier than any that Mather might have claimed. Hackley and Bell had been there years before Mather, but Bell's settlement and residence was, like that of Mather, with the consent of the military authorities, and he was in no position to lay claim to any portion of the diminished reservation until the abandonment by the military.

Hackley's settlement antedates all other claims, antedates the selection of a site for a cantonment, antedates the reservation. He appears, in fact, to be the first white man who ever lived on this land. He unquestionably is fully protected by the act of 1826, that of 1858 and that of July 5, 1884. He meets the requirements of the first proviso of the second section of the latter act.

Is there a valid adverse claim to this land of record, such as would operate to nullify Hackley's right by reason of his having no filing of record? I think not; all the filings that had been allowed by your predecessors in office upon the filing of the sub-divisional survey of the reduced reservation were canceled by letter "G" of July 22, 1884, which decision was affirmed by the department May 16, 1884. (See 2 L. D., 605; 11 C. L. O., 90.) Mather's application to file was rejected under these decisions.

So that as far as the record is concerned all these parties are on equal footing, and as Hackley's rights antedate those of all other settlers, they are paramount before this office. The only question that still remains to be determined is the one that you raise in regard to public notice before allowance of entry.

My construction of the second section of the act of June 5, 1884,
35 is that in the event of the survey, appraisal and public sale of a military reservation, such notice is required to be given; this would be the usual course in the case of a reservation of large area, but the proviso to that section allows a settler who was in actual occupation of any section of such reservation who has the necessary qualifications to enter not exceeding 160 acres under the general laws; for this purpose no notice is necessary, and as I

am of the opinion that Hackley's heirs are entitled under the proviso to enter the entire reservation of 148.11 acres, I see no necessity for the appraisal or notice referred to in the early part of the section.

This view seems to be confirmed by the opinion of the Hon. Secretary of the Interior, in the Daniel Mather case above cited.

That the land is now within the incorporated limits of Tampa does not affect the rights of settlers acquired before the incorporation, nor does the fact that at different times business of different kinds was conducted on the tract, subsequent to the settlement of Hackley and without his consent.

I have therefore rejected all the claims to this tract and to each legal sub-division thereof, with the exception of that of the heirs of Hackley, who will, if this decision becomes final, be allowed to make entry under section 2269, Rev. Stat. U. S.

So advised the parties, allowing the usual time for appeal.

I have, in this connection, also to advise you that there is pending in this office, and now under consideration, an application made by John B. Hamilton, supervising surgeon-general of the marine hospital service, for the setting aside and reserving of a tract, described by metes and bounds and containing an area of five acres, for the purposes and uses of the United States marine hospital service.

This application has not yet been acted upon, but in the event that such a reservation is set apart and established, the rights of all the parties discussed in this decision, whatever they may be found to be, must and will be held thereto.

Respectfully,

WM. STONE,
Ass't Commissioner.

36 EXHIBIT H.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *November* 25, 1892.

L. & R. Div., vol. 15–1040.

Ft. Brooke military reservation, Florida.

DANIEL MATHER ET AL.
vs.
THE HEIRS OF R. J. HACKLEY, DECEASED.

The Commissioner of the General Land Office.

SIR: I have considered the case, in which Daniel Mather, the City of Tampa, the heirs of Louis Bell, deceased, also W. B. Henderson, Lizzie W. Carew, Julius Cæsar, Frank Jones, E. B. Chamberlain and Martha Lewis, alias Martha Stillings, are the appellants, and The Heirs of Robert J. Hackley, Deceased, are the appellees, upon the several appeals by the former from your decision dated December

10, 1880, rejecting their claims for land within what is known as the Fort Brooke military reservation, in the State of Florida, and allowing the heirs of Robert J. Hackley, deceased, to perfect their claim to the land.

The status of said reservation has been frequently considered by this department, and a brief reference to its history may not be inappropriate.

As early as November 5, 1823, the War Department issued an order to Colonel George M. Brooke, of the United States Army, to proceed to the then Territory of Florida, and, in conjunction with James Gadsden, of said Territory, to select a site for a cantonment or garrison of the United States troops in that vicinity. Pursuant to said order, a site was selected for a garrison at a point on the east side of the Hillsborough river, at its junction with the eastern arm of Tampa bay, and some time in March, 1824, the United States took possession, and used the site so selected as a military post.

On December 10, 1830, said site was formerly (formally) reserved by executive order, in which its limits were fixed at sixteen miles square.

On January 21, 1845, General Worth recommended the reduction of said reservation to "four miles square," which recommendation was concurred in by General Scott, on February 18, and approved by the Secretary of War, on February 19, 1845.

On September 14, 1846, Major Whiting, commanding the
37 post at Fort Brooke, acknowledged the receipt of a letter transmitting "an extract of the report of Major-General Scott and the order of the Secretary of War, relative to a reduction of the reservation at Tampa bay," and reported that he had decided under said instructions to reduce the reservation to the following limits, namely:

From the point where the poles on the north side of the "enclosed ground" strikes the east bank of Hillsborough river, running in a line with said poles to or near the first angle, thence in a more northerly direction, say seventeen hundred yards, more or less, to embrace the spring from which the whole garrison is supplied with water (good water can be obtained at a nearer point in the village of Tampa), thence to the most convenient point on the bay, east of the "enclosed grounds," thence by the shore of the bay and river to the point of departure.

This report was not submitted to the Secretary of War until March 22, 1848, when it was approved by him on the same day, and transmitted to the President, who approved the same on March 24, 1848.

By the act of Congress, approved July 25, 1848 (9 Stat., 726), there was confirmed and granted to the county commissioners of the county of Hillsborough a location of one hundred and sixty acres "for the county site of said county at Tampa, viz: Beginning on the east bank of Hillsborough river, at the point where the reduced

military reservation, as made by Major L. Whiting, September 14, 1846, strikes the same," etc.

On July 24, 1860, the Secretary of War advised the Secretary of the Interior, as follows:

SIR: Referring to the correspondence between the two departments on the subject, I have the honor to enclose to you a report of the Quartermaster General, showing that Fort Brooke is now in readiness to be turned over to the Department of the Interior, in pursuance of the arrangements made to that effect.

On November 27, 1860, the Commissioner of the General Land Office returned to the Secretary of the Interior the letter of Senator Yulee, enclosing a proposition of one James M. McKay to rent said reservation, with the statement that he did not propose "at present" to recommend its sale, and saw no objection to its being rented to Mr. McKay, at a fair rental.

On December 3, 1860, the Secretary of the Interior consented to the occupancy of said tract by said McKay, upon his filing an agreement to take proper care of the buildings and grounds, and deliver the same on demand in as good condition as he received
38 them, without cost to the United States, and for the faithful performance of said agreement was to give bond in the sum of $1,000.

In January, 1861, McKay executed the agreement, gave the bond required, and took formal possession of said land. The recital and condition of said bond are:

That whereas, the said James McKay has received of and from the said Commissioner of the General Land Office, the possession, custody and control of the enclosed grounds of Fort Brooke, situate in the county and State aforesaid, with the appurtenances thereunto belonging, as shown by an agreement of even date herewith, now, if the said James McKay shall well and truly perform all and every part of said agreement in manner and form as he has agreed to do, then the foregoing obligation to be null and void, otherwise to remain in full force and virtue.

The agreement, as above stated, bound the said McKay, his heirs, executors, and administrators, to take good and proper care of the buildings, fences, grounds, and other improvements, in and upon said premises, and to return them to the said Commissioner of the General Land Office or his successors in office, in *and* (an) as good condition as they are when I receive them, without any costs or charge to the United States, whatever, ordinary wear and tear expected.

From 1861 to 1864 the reservation was held by the Confederate authorities when it was retaken by the United States, and occupied for a few days, and was again occupied in May, 1865, for a month, and again occupied by the United States in July, 1865, and garrisoned continuously until August 16th, 1869, when the troops were withdrawn, but the custody of the reservation was with the War

Department until February 16th, 1874. (See letter of Secretary of War, dated March 16th, 1874.)

On April 6, 1870, the Secretary of War, in reply to a letter addressed to him by the Commissioner of the General Land Office, dated March 26, same year, "relative to the public lands occupied by this (his) department for military purposes, at Fort Brooke, Florida," advised the Secretary of the Interior "that there is no longer any objection to their disposition by the General Land Office under the laws governing the subject. The necessary orders have been given for the disposition of the movable public property at the post."

Afterwards, on August 31, 1870, the Adjutant General of the Army addressed a communication to the Commissioner of the General Land Office, saying:

39 Referring to your communication of April 9, 1870, I am directed by the Secretary of War to request that you will suspend for the time being any further action upon the letter of April 6, 1870, from the War Department relinquishing the Fort Brooke military reservation in the State of Florida, it appearing from recent reports from the board of engineer fortifications that the reservation will be required for military purposes, in view of which measures are being taken to have it surveyed and lawfully declared and set apart by the executive.

In reply to said communication, Commissioner Wilson, on September 2, 1870, advised the War Department:

That on the 9th April, last, the register and receiver of the U. S. land office, at Tallahassee, Florida, were informed of the above relinquishment (April 6, 1870), but directed to allow no entries of land within the reservation until further advised by this office. These officers, as also the surveyors general have this day been furnished copies of your letter, and instructed to allow no entires until further directed.

(See Record Surv. Div., vol. 2, 401–402.)

On January 22, 1877, the War Department requested the President to set apart by executive order, in accordance with the accompanying plat, three tracts, as follows:

I. Tract marked A, B, C, containing 127,417 acres.

II. Tract marked "*m*, *m*, *l*, *k*," containing ten acres.

III. Right of way between tracts I and II, marked B, *n*, K, P.

Upon said request, the President, the same day, made the following indorsement:

The within request is approved, and the reservation is made accordingly. The Secretary of the Interior will cause the same to be noted in the General Land Office.

This order was transmitted by the Secretary of the Interior to the General Land Office on January 25th, same year. Afterwards, on May 29, 1878, the Secretary of War again requested "that a military reservation at the post of Fort Brooke, Tampa,

Florida, with boundaries as hereinafter described, may be duly declared and set apart by the Executive." A plat of the reservation, with field notes, was transmitted, showing its area to be 155½ acres. On the same day, the President made the following indorsement:

The within is approved, and the reservation is made and proclaimed accordingly. The Secretary of the Interior will cause the same to be noted in the General Land Office.

On June 11, 1878, the boundaries of said reservation were announced in General Orders No. 5.

On January 4, 1883, said reservation was relinquished and transferred by the Secretary of War to the Interior Department, and, on March 8th, following, the Secretary of the Interior was advised that "the services of the quartermaster's agent, now in charge of the reservation, will be continued until the 15th, instant, at which date he will be discharged."

On March 16, 1883, you transmitted to the local officers, at Gainesville, Florida, "an approved diagram of the subdivision" into seven lots, containing in all 148.11 acres, in sections 18 and 19, T. 29 S. R. 19 E., and section 24, T. 29, S. R. 18 E., which was received at said office on the 22nd day of the same month.

On April 2nd, following, you sent a telegram to the local offices directing them to allow no entries upon any land within said reservation. Prior to the receipt of said telegram, certain parties were allowed to enter and file for land under the homestead and pre-emption laws, and certain other persons applied to enter and file for said land, which applications were rejected by the local officers, on account of the prior entry and filings of record.

On December 17, 1883, you considered the several applications for land within the limits of said diagram, and rejected the same and held that the land was not subject to settlement and entry under the homestead and pre-emption laws, but must be disposed of under the provisions of the several acts of Congress, approved August 3, 1846 (9 Stat., 51, R. S. U. S., 2455), August 18, 1856 (11 Stat., 87), and July 2, 1864 (13 Stat., 374, R. S. U. S., 2364).

On January 22, 1884, you held for cancelation Edmond S. Carew's homestead entry No. 11,637, of lot 16, sec. 18, lots 12, 13 and 14, sec. 19, T. 29, S. R. 19 E., and lots 8, 9 and 10, sec. 24, T. 29, S. R. 18 E., filed March 22, 1883, also the pre-emption declaratory statement No. 564, filed by Clifford Herrick, on March 26, 1883, for the lands covered by said homestead entry, alleging settlement thereon March 21, 1883; and the pre-emption filing No. 569, of Louis Bell, made March 30, 1883, for the same lands upon which he alleged settlement March 25, 1883, covering said reservation.

On May 16, 1884, Mr. Secretary Teller considered the several appeals filed from your decisions, and held that said act of 1856 and section 2364 of the U. S. Revised Statutes must be construed together, and they prescribe the manner of the disposition of military reservations in Florida; that claimants must take notice of the law upon the subject, and that said entry and filings having been prematurely

made, your said decision holding the same for cancelation was correct and must be affirmed (2 L. D., 603–610).

41 On May 21, 1885, Acting Secretary Muldrow reaffirmed said decisions, and called your attention to the provisions of section 2 of the act of July 5, 1884 (25 Stat., 103), relative to the rights of actual settlers upon said reservation. On April 30, 1885, Acting Secretary Muldrow affirmed your decision of June 13, 1884, rejecting the application — Enoch B. Chamberlain to make homestead entry of lot 14, or the N. W. ¼ of the S. W. ¼ of sec. 19, T. 29, S. R. 19 E., for the reason that at the date thereof the land was covered by homestead entry of Carew.

Afterwards, on May 10, 1887 (5 L. D., 632), Acting Secretary Muldrow considered the application of Daniel Mather to make preemption entry of lots 8, 9 and 10, of sec. 24, T. 29, S. R. 18 E., lot 16, sec. 18, and lots 12, 13 and 14, of sec. 19, T. 29, S. R. 19 E., Gainesville, Florida, under said act of July 5, 1884, upon his appeal from the action of the local officers, rejecting the same, because he had "no claim of record upon which proof can be made covering the land in question," and held that in the absence of an adverse claim, failure to file a declaratory statement will not prejudice the right of the settler to make final proof and payment; and that said act of July 5, 1884, governs the disposal of all lands in abandoned military reservations, not otherwise disposed of, and protects the rights of settlers prior to January 1, 1884, duly qualified to make homestead entry; that said Mather, if his allegations be true, is "entitled to offer proof, and if in all respects qualified, may make entry, provided there is no objection other than those discussed herein."

On May 17, 1889, you were advised that on June 4, 1887, Honorable Wilkinson Call, a United States Senator from Florida, filed in the department a request that said case of Daniel Mather be reconsidered, for the reason that a person in the casual occupation of a house and lot upon a military reservation while the same was under the control of the military authorities could acquire no rights as a homestead settler, and also because a bill had been reported upon favorably by the Committee on Public Lands at the "49th session," to donate said reservation to the town of Tampa; that pending the consideration of said motion, the chairman of the Senate Committee on Public Lands referred to the department, for its views thereon Senate bill No. 2712, "To donate to the town of Tampa, in Florida, the Fort Brooke military reservation for the benefit of the free schools and other purposes."

Attention was called to the report of Mr. Secretary Vilas upon said bill, dated May 10th, 1888, relative to the status of said
42 reservation, as to whether the same was, as alleged, within the limits of the city of Tampa, and you were informed that:

In view of this information that has been acquired by the department since the rendering of the decision in the case of Daniel

Mather, and of the conflicting claim of the widow of Edward S. Carew, I have thought proper to direct that a hearing be ordered in the case of Mather, for the purpose of determining whether said land is included within the limits of an incorporated town, or occupied for the purposes of trade and business, and to determine the character of Mather's settlement, and whether it was simply as an occupant by permission of the military authorities, and to this end I return all the papers before the department in the case of Mather and also in the case of Lizzie W. Carew.

The hearing was duly had, and on December 20, 1889, the local officers rendered their joint opinion upon the evidence submitted by the respective parties.

In their opinion the local officers state that due notice was sent to Daniel Mather, S. W. Carew, Andrew Stillings, Joel B. Myers, Richard Nash, G. W. Kirby, Frank C. Thomas, Henry W. Beach, John S. Havens, Julius Caesar, Louis Bell, W. B. Henderson, Clifford Herrick, E. B. Chamberlain, Marion M. Nelson, Wert S. Myers and the heirs of R. J. Hackley, deceased, also the mayor and city council of Tampa, Florida; and that all of the said parties appeared by counsel and submitted their evidence in support of their respective claims.

The local officers first considered the claim of the heirs of said Hackley, and found that said R. J. Hackley entered upon the land claimed by his heirs included in said reservation in 1824, under the provisions of the acts of Congress approved February 5, 1813 (2 Stat., 797), and April 22, 1826 (4 Stat., 154); that said Hackley never relinquished his claim to said land; that "Hackley made entry in good faith and for the purposes of securing a home" under said acts of 1813 and 1826, and that his claim is superior, in the absence of any adverse claim, to the claims made after the abandonment of said reservation in 1883.

The local officers further find that said Mather went on said reservation with a man by the name of Ross, with no intention of making the land his home, that "Mather's declaratory statement was filed as a mere speculation in the joint interest of himself and Ross, without intent on the part of either to locate permanently as a pre-emptor or homesteader on the land;" and that in 1885, Mather and Ross abandoned said reservation and have since lived in Tampa.

43 With reference to the claim of Mrs. Carew, the local officers report that her husband, Edmund S. Carew, made his said entry on March 22nd, 1883, which was canceled as above set forth; that in making said entry Carew was acting as the agent of Senator Call, who furnished the money to pay the fees and commissions in making said entry, and intended that the entry should be for the benefit and use of the city — Tampa; that said Carew did not make said entry in good faith for a home, but under an understanding that a part of the land should be donated to the city of Tampa, for a park, and the rest to be held jointly with other parties who were in-

terested in advancing the interests of said city; that said entry was not made in good faith for the purpose of making the land his permanent home.

The claim of Louis Bell is found to be based upon his settlement made with the permission of the military, but on account of his good character, the local officers find that "the claim of his wife and children are entitled to more consideration from the Government than any of the other claims filed in this case."

The claim of the city of Tampa is based upon the facts that in 1889 the State of Florida, by legislative enactment, merged the towns of Tampa and North Tampa into one corporation, under the name of the city of Tampa, and extended the limits of the city so as to include said reservation, and it is claimed that the city is entitled to said reservation for a public park, and such other uses as may be deemed necessary.

The local officers find that the incorporated town of Fort Brooke, having a mayor and council, adjoins said reservation, and has equal corporate rights with the city of Tampa, that on January 1, 1883, and also on July 5, 1884, the towns of Tampa and North Tampa did not include said reservation, but *was* contiguous thereto, and only included said reservation under said act of incorporation of 1889; testimony fails to show that any considerable portion of said reduced reservation was used and occupied for trade and business.

With reference to the application of William B. Henderson, dated Nov. 27, 1883, to locate Gerard scrip upon the lands included within said reservation, the local officers say: "It is not clear that Gerard scrip can be located upon other than public lands already subject to entry, and of the minimum value of one dollar and twenty-five cents per acre." The local officers did not consider it necessary to review in detail the evidence relative to the other claims filed for lands within said reservation because "it would be merely a
44 repetition of what has already been stated with reference to the other claims referred to at length."

The local officers, after commenting upon said acts of Congress, relative to the disposition of lands in military reservations in Florida, find that the status of said reservation is the same as when it was relinquished to this department in 1883; that until the necessary steps are taken it cannot be disposed of under the act of July 5, 1884, and that "those who were upon the reservation prior to or on the 1st day of January, 1884, were there as squatters, having no legal claim or right to any portion of the land." They further "recommend that all claims now pending, either contest, pre-emption, or homestead, excepting the claims of the heirs of R. J. Hackley and Louis Bell, be canceled, and that such relief as may appear best in the judgment and within the authority of the department be granted in the two excepted cases just above named."

On December 10, 1890, you considered the several appeals filed from the decision of the local officers, which you quote and make a

part of your own. You state that the Mather case partially determines the status of said reservation, and that he was entitled to offer his proofs, and, if qualified, make entry, "provided that there is no objection other than those discussed herein;" that the evidence shows that Mather settled upon said land with the permission of the military authorities, which was sufficient to identify him with the cantonment, and his subsequent removal to Tampa was an abandonment of any right he might have had by reason of being on the land at the date of the abandonment of the reservation; that in addition, other rights had attached long prior to Mather's claim; that Hackley's settlement, which was prior to the selection of said reservation, was also prior to all other claims, and is fully protected by the provisions of said acts of 1826, 1858 and July 5, 1884; that under the second section of said act of 1884, if a survey and appraisal be made, and a public sale ordered, the notice thereof must be given, but where, under the proviso of said section, a settler is entitled to enter the whole reservation, there is no necessity for appraisal or notice, and the fact "that the land is now within the incorporated limits of Tampa does not affect the rights of settlers, acquired before the incorporation, nor does the fact that at different times business of different kinds was conducted on the tract and without his consent."

You accordingly rejected all the claims on this tract, except that of the heirs of Hackley, who were allowed in case your decision became final to make entry under section 2269, U. S. R. S., sub-
45 ject, however, to an application made by the supervising surgeon general of the marine hospital service that there be set apart a certain described tract containing five acres for the use of the United States marine hospital service, which has not yet been considered by you.

Elaborate briefs have been filed by the appellants, and besides, the questions at issue were discussed in an oral argument had on September 5 and 6, 1892.

I do not deem it necessary to set out in detail the grounds of error alleged in the several appeals. It is urged on the part of those claiming adversely to the heirs of said Hackley that his said settlement was illegal in its inception and not protected under the said act of July 5, 1884.

If Hackley's claim to the land be sustained, the others must necessarily fail. The facts relative to his settlement do not appear to be disputed. He went upon said land in 1823 and 1824, prior to the selection thereof for a military site for Col. Brooke, and was removed therefrom by the military forces in possession of the reservation in March, 1824; that in 1835 he filed in the local office at St. Augustine, Florida, proof in support of his claim, and afterward, on November 27, 1843, he filed in the Newnansville land office, same State, a notice that he claimed "the right of pre-emption to the tract of land known as Cantonment Brooke, bay of Tampa, under the pre-emption act approved April 22 1826;" that in 1845 said Hackley

died at Tallahassee, in said State, where he had continued to reside after being removed from said land. On October 14, 1887, the administrator of the estate of said Hackley applied to purchase said lands, which application was rejected because the land applied for is embraced in said reservation. Upon a subsequent hearing, the local officers found that Hackley had the prior claim, and you awarded all the land in said reservation to his heirs.

Let us first inquire what rights Hackley acquired under said act of 1826. The first section of the said act provided:

That every person, or the legal representatives of any person, who, being either the head of a family, or twenty-one years of age, did on or before the first day of January, in the year one thousand eight hundred and twenty-five, actually inhabit and cultivate a tract of land situated in the Territory of Florida, which tract is not rightfully claimed by any other person, and who shall not have removed from the said Territory shall be entitled to the right of pre-emption in the purchase thereof, under the same terms, restrictions, conditions, provisions and regulations in every respect, as are directed by the act entitled "An act giving the right of pre-emption, in
46 the purchase of lands, to certain settlers in the Illinois Territory, passed February the fifth, one thousand eight hundred and thirteen (2 Stat. 797).

By section two of said act of 1813, persons claiming a preference right of entry were required to file with the proper local land officers a notice particularly describing the quarter section which he claims, and any person entitled to a preference right of purchase, who shall fail to make entry of the land claimed by him at least two weeks before the commencement of the public sales, shall forfeit his right, and the land claimed by him shall be offered at public sale with the other public lands in the district to which it belongs. Besides, by the law in force at the date of Hackley's said settlement, persons were not allowed to settle upon any of the lands of the United States, except as tenants at will, under contract to be entered into with the local land officers. See act of Congress approved March 3, 1807 (Stat. 445), act of March 30, 1822, sec. 9 (3 Stat. 654). There can hardly be serious question, I think, that when the officers of the Government selected the site of said reservation, Hackley had no right thereto. His settlement was clearly illegal, and by the express terms of said act of 1826 said reservation, being rightfully claimed as a reservation, was excepted from its provisions.

In the case of Frisbie *vs.* Whitney (9th Wallace, 187), the Supreme Court held that occupation and improvement on the public lands with a view of pre-emption, confer no vested right in the land so occupied; that such vested right is only obtained under the pre-emption laws, where the purchase money has been paid and the receipt of the proper land officer given to the purchaser, and that until this is done, Congress may legally withdraw the land from entry or sale, though this may defeat the imperfect right of the settler. In the opinion of the court, p. 196 and 197, it is said:

The argument is urged with much zeal that because complainant did all that was in the power of any one to do towards perfecting his claim, he should not be held responsible for what could not be done. To this we reply, as we did in the case of Rector *vs.* Ashley (6 Wallace, 142), that the rights of the claimant are to be measured by the acts of Congress, and not by what he may or may not be able to do, and if a sound construction of these acts shows that he had acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient.

This ruling was reaffirmed by the Supreme Court in the Yosemite Valley case (9th Wallace, 77), and in Shepley *vs.* Cowan (91 U. S., 330–337).

47 In the case of Atherton *vs.* Fowler (96 U. S., pp. 513–517), Mr. Justice Miller said:

In the earliest stages of our land system no right or interest could be secured by the individual in any public land until it had been surveyed into legal subdivision. Nor after this had been done was it subject to sale until, by a proclamation of the President, it was brought into market. It often occurred that emigration, in advance of the readiness of the public lands for these sales had caused hundreds and thousands to settle on them; and when they came to be sold at public auction, their value, enhanced by the houses, fences, and other improvements of the settler, placed them beyond his reach and they fell into the hands of heartless speculators. To remedy this state of things the pre-emption system was established. This at first was only applicable to lands which had been surveyed. But gradually this was changed, until, in 1862, pre-emptors were allowed, on unsurveyed lands as well as those surveyed. Act of June 2, 1862, 12 Stat. 418.

The Government has never offered said reservation for sale. On the contrary, the War Department legally acting, presumably by direction of the President, took possession of said land and continued in possession thereof until it was relinquished to this department for disposal under the laws then existing.

But there is another reason why the claim of Hackley's heirs must be rejected. As we have seen, he had no vested right to said land in his lifetime, because his settlement was illegal in its inception, and, at the date of his death, he had no interest in said land which could descend to his heirs. In the case of Buxton *vs.* Traver (130 U. S. 232), the United States Supreme Court decided that a settler upon public lands, in advance of the public surveys, acquires no estate which he can devise by will, or which, in case of his death intestate, will fall to his heirs, at law, until, within a specified time after the surveys and the return of the township plat, he files a declaratory statement such as is required when the surveys have preceded settlement, and performs the other acts prescribed by law.

On page 237 of the opinion, the court says:

Section 2269 of the Revised Statutes, upon which the plaintiffs rely, has no application to the case presented by them.

That section was taken from section 2 of the act of March 3, 1843, 5 Stat. 620, to authorize the investigation of alleged frauds under the pre-emption laws, and for other purposes. At that time no settlement on unsurveyed lands was permitted by the laws of the United States, and the second section was intended to secure to the
48 heirs of the deceased pre-emptor a claim to the benefit of the pre-emption laws, which he had initiated, but not completed before his death, by filing in due time all the papers essential to the establishment of the same. His executor or administrator, or one of his heirs was in that event allowed to file such papers. No claim of the deceased in this case was lost by any failure to file the necessary papers. The time for any papers to be filed did not arrive during his life.

Any claim for injury on account of the removal of Hackley from said reservation in 1824 can be recognized only by the legislative branch of the Government, for it is clear that the heirs have no claim for said land which can be recognized by this department.

Having arrived at the conclusion that Hackley's heirs have no claim for said land, it will be proper to inquire into the legality of the other claims for said land.

The effect of the filing of said diagram in the local land office on March 22, 1883, was duly adjudicated in said departmental decision of Secretary Teller (*supra*) affirming your action in holding for cancellation the entry of Carew and the declaratory statements of Herrick and Bell, and holding that the land cannot be disposed of until ordered into the market under the provisions of sections 2364 and 2455, R. S. U. S.

No further action was taken by the department looking to the final disposition of said lands, and Congress, on July 5th, 1884, passed said act relative to the disposition of abandoned military reservations. The first section provides for the transfer of abandoned military reservations to the Interior Department whenever they have, in the opinion of the President, become useless. Section two of the same act declares "That the Secretary of the Interior may, if in his opinion the public interests so require, cause the said lands, or any part thereof, in such reservation, to be legally surveyed, or to be subdivided into tracts of less than forty acres each, and into town lots, or both." Said section two further provides for the appraisement of "each tract thereof" by a commission of "three competent and disinterested men," and the sale of said lots to the highest bidder for cash at not less than the appraised value thereof, nor less than one dollar and twenty-five cents per acre, after due publication of notice of said sale, with a proviso:

That any settler who was in actual occupation of any portion of any such reservation prior to the location of such reservation, or settled thereon prior to January first, eighteen hundred and eighty-

four, in good faith for the purpose of securing a home and of
49 entering the same under the general laws, and has continued in such occupation to the present time, and is, by law, entitled to make a homestead entry, shall be entitled to enter the land so occupied, not exceeding one hundred and sixty acres in a body, according to the Government surveys and subdivisions; provided further, that said lands were subject to entry under the public land laws at the time of their withdrawal.

By section three of the act provision is made for the appraisement and sale at public auction of the improvements, buildings, building materials and other property "upon any such lands, subdivisions or lots not hereafter sold by the United States authorities, with a proviso:

That where buildings or improvements have been heretofore sold by the United States authorities, the land upon which such buildings or improvements are situate, not exceeding the smallest subdivision or lot provided for by this act, upon the reservation on which said buildings or improvements are situate, shall be offered for sale to the purchaser of said improvements and buildings at the appraised value of the lands, and if said purchaser shall fail for sixty days after notice to complete said purchase of lands, the same shall be sold under the provisions of this act.

The finding of the local officers and your office, that the entry of Carew and the settlement of Mather were not made in good faith, is supported by the evidence, and their claims were properly rejected. Nor will the occupation of the land while withdrawn by Louis Bell, with the permission of the military, constitute him a settler within the purview of said act of 1884. The application to locate Gerard scrip was rightly rejected, for the land at that time was segregated by said entry of Carew, and the local officers had been directed not to allow any entries or filings on said reservation.

It is clear that none of said claimants is entitled to enter any of the lands claimed by them under the provisions of said act of 1884, for the obvious reason that under the said second proviso the lands were not "subject to entry under the public land laws at the time of their withdrawal," and the Secretary of the Interior has not proceeded to execute the provisions of said act.

The reservation was not brought into market in 1860, but was rented by the department to said McKay, for the reason that the Commissioner of the General Land Office did not propose, "at present," to recommend its sale.

No notice has ever been given that the reservation was subject to settlement and entry under the general land laws of the
50 United States. Besides, when said executive orders of 1877 and 1878 were made, the action of the department, relative to the disposition of said reservation, was suspended, and the local officers at Tallahassee were specially directed, on April 9, 1870, "to allow no entries until further directed." This order was never revoked prior to the issuance of said executive orders, the price of the

land was never fixed as required by said act of 1864, and the department expressly decided that, prior to 1883, the land in said reservation was not subject to entry and settlement, and that said filings and entry "were premature." It was also said that "the 148.11 acres that only remain of this reservation," may rightly be regarded as an "isolated or disconnected" tract under section 2455, before recited, which might properly be ordered by you "into market after due notice," and exposed to sale. By reason of its long reservation and the settlement of the surrounding country, and the building of a town near by the tract in question has become valuable, and these numerous claimants and all others ought to have an equal opportunity of purchase," citing Public Domain, 249, and 3 Ops., 274. The doctrine is also announced in Eldred *vs.* Sexton, 19 Wall. 189.

It is manifest, therefore, that the lands in said reservation were not subject to entry under the public land laws at the time of their withdrawal, and, hence, said claimants can not claim protection under said act of 1884.

Under the law as it now stands, said reservation will be disposed of, whenever "the Secretary of the Interior is of the opinion the public interests so require," under the provisions of said act of 1884.

Your judgment awarding said lands to the heirs of said Hackley is reversed, but affirmed in so far as it rejects the other claims to the land in controversy, and action looking to the disposal of said land will be deferred until you are further advised by this department.

The papers transmitted by your letter "G," dated September 28, 1891, are herewith returned.

Very respectfully, JOHN W. NOBLE, *Secretary.*

L. & R. letter press, vol. 256, p. 304.

51 EXHIBIT "J."

DEPARTMENT OF THE INTERIOR, E. W.
WASHINGTON, *July* 24, 1894.

MATHER ET AL.
vs.
THE HACKLEY HEIRS.

Involving Fort Brooke military reservation, Gainesville land district, Florida.

The Commissioner of the General Land Office.

SIR: The various parties at interest, to-wit: Daniel Mather, the City of Tampa, the Heirs of Louis Bell, Deceased, W. B. Henderson, Lizzie W. Carew, Julius Cæsar, Frank Jones, E. B. Chamberlain, Martha Lewis, alias Martha Stillings, and the Hackley Heirs, have,

by their attorneys, filed motions for review of departmental decision in the case of Mather, *et al.*, *vs.* The Hackley Heirs (15 L. D., 487).

Louis Bell filed declaratory statement on March 30, 1883, and died on the reservation in November, 1885.

Daniel Mather offered to file declaratory statement April 14th, 1883.

Frank Jones applied to file declaratory statement on April 5th, 1883.

Edward S. Carew made homestead entry on March 22, 1883, covering the whole of the reservation. Mrs. Carew, his widow, subsequently limited her claim to lots 9 and 10, sec. 24, T. 29, S. R. 18 E., amounting to 35.70 acres.

Julius Cæsar applied to file declaratory statement on the 23rd of April, 1883.

Enoch B. Chamberlain made homestead application on April 22nd, 1884.

Andrew Stillings, husband of Martha Stillings, applied to file declaratory statement on April 25th, 1883.

W. B. Henderson applied on the 27th, day of November, 1883, to locate lot No. 8 and lot No. 9, sec. 24, T. 29, S. R. 18 E., containing 36.87 acres, in satisfaction of Wm. Gerard's special certificate No. 2, subdivision No. 11, issued under the act of Congress approved on the 10th of February, 1855, for the relief of the heirs of Joseph Gerard.

The claim of the Hackley heirs is based upon the provisions of the act of April 22, 1826 (4 Stat., 154), as will be hereinafter explained.

A number of these motions for review were filed too late,
52 but, in the exercise of that supervisory power vested in the Secretary of the Interior all of the cases will be considered upon their merits.

The decision under review deals with the legal status of the Fort Brooke military reservation of Florida, which, during its existence embraced the land in controversy.

Said claims are therein held subject to disposition in accordance with the provisions of the act of July 5th, 1884 (23 Stat., 103), the first section of which provides as follows:

That, whenever in the opinion of the President of the United States, the lands, or any portion of them included within the limits of any military reservation heretofore, or hereafter declared, have become or shall become useless for military purposes, he shall cause the same or so much thereof as he may designate, to be placed under the control of the Secretary of the Interior for disposition as hereinafter provided, and shall cause to be filed with the Secretary of the Interior a notice thereof.

It will be noticed that by the terms of the act itself, as viewed in the light of the ordinary rules of construction, it is limited in its application to military reservations that were in existence at the date of its passage, or that should be thereafter created.

The President therein is empowered to place under the control of the Secretary of the Interior, such lands as "have become, or shall become useless for military purposes."

But the land formerly embodied in the Fort Brooke military reservation had been on January 4th, 1883, relinquished and transferred by the Secretary of War to the Interior Department and thus restored to the public domain before the passage of said act; therefore, there can be no reason why the President should consider their value for military purposes, in the sense contemplated by said act.

The scheme contemplated by the statute was the restoration of useless reservations. At that time the land in controversy did not belong to any reservation. I am of the opinion, therefore, that the act of 1884 has no application in the disposition of the lands belonging to said reservation.

The first section of the act of April 22, 1826, *supra*, upon the provisions of which the Hackley heirs base their claim, provides:

That every person, or the legal representatives of any persons, who, being either the head of a family, or twenty-one years of age, did, on or before the first day of January, in the year one
53 thousand eight hundred and twenty-five, actually inhabit and cultivate a tract of land situated in the Territory of Florida, which tract is not rightfully claimed by any other person, and who shall not have removed from the said Territory, shall be entitled to the right of pre-emption in the purchase thereof, under the same terms, restrictions, conditions, provisions and regulations, in every respect, as are directed by the act, entitled "An act giving the right of pre-emption, in the purchase of lands, to certain settlers, in the Illinois Territory," passed February 5th, one thousand eight hundred and thirteen; provided, that no person shall be entitled to the provisions of this section, who claims any tract of land in said Territory, by virtue of a confirmation of the commissioners, or by virtue of any act of Congress.

It appears that R. J. Hackley entered upon the land claimed by his heirs, included in said reservation, in 1823, and that said Hackley never relinquished his claim to said land, and that he made settlement in good faith, so far as the record discloses, and for the purpose of securing a home, which claim, his heirs contend, is superior to any that were made subsequent to the abandonment of said reservation.

It further appears that, in March, 1824, in obedience to instructions from the War Department, that portion of said reservation now in controversy was occupied by United States troops in cantonment, and was so used until December, 1830, when it was formally reserved by executive order in which its limits were fixed at sixteen miles square. Subsequent to this, said lands were in a state of reservation the greater portion of the time, until January 4th, 1883, when they were relinquished and finally restored to the public domain.

R. J. Hackley was ejected from the land by the military in 1824.

At that time, the provisions of the act of March 3, 1807 (2 Stat., 445), were in force in the State of Florida, having been re-enacted in the act providing for the establishment of a territorial government in said State on March 30th, 1822 (3 Stat., 654). The first section of the act of March 3rd, 1807, *supra*, provided:

That if any person or persons shall, after the passing of this act, take possession of, or make a settlement on any lands ceded or secured to the United States, by any treaty made with a foreign nation, or by a cession from any State to the United States, which lands shall not have been previously sold, ceded, or leased by the United States,
or the claim to which lands, by such person or persons, shall
54 not have been previously recognized and confirmed by the
United States; or if any person or person- shall cause such lands to be thus occupied, taken possession of, or settled; or shall survey, or attempt to survey, or cause to be surveyed, any such lands; or designate any boundaries thereon, by marking trees, or otherwise, until thereto duly authorized by law; such offender or offenders shall forfeit all his or their right, title, and claim if he hath, or they have, of whatsoever nature or kind the same shall or may be, to the lands aforesaid, which he or they shall have taken possession of, or settled, or cause to be occupied, taken possession of, or settled, or which he or they shall have surveyed, or attempt to survey, or cause to be surveyed, or the boundaries thereof he or they shall have designated or cause to be designated, by marking trees or otherwise.

When R. J. Hackley was ejected from said land by the military, in 1824, he could not, in view of the provisions of the act above quoted, have *iniated* (initiated) any claim to said lands by virtue of his settlement.

The heirs of Hackley, however, relying upon the provisions of the above quoted act of 1826, contend that the cantonment which existed from 1824 to 1830 was not such a reservation as will defeat the pre-emption rights of said heirs, under the act of 1826. His position is, that

When the act of 1826 confirmed in all settlers upon those lands prior to January 1, 1825, the right to purchase the lands whereon they resided, etc., no mere occupancy by the military, nor even constructive reservation of an inferior order or dignity, could defeat the operation of such an act of Congress.

In support of his position, counsel cites the case of Johnson *vs.* The United States, 2nd, Court of Claims, 391. Johnson's claim was based upon what is known as the "Oregon donation act," and, as required by that act, he had settled upon and occupied the land in controversy for four years continuously, with nothing left to be done to secure patent but to make proof of the same, when the tract was forcibly taken and occupied by troops of the United States, "without the knowledge of the President, the Secretary of War, or any high officer of the Government." In that case, the court held that

such an occupation was not a reservation within the meaning of the Oregon donation act, and could not affect the rights of the plaintiff.

In the case at bar, however, the facts are very different.

The tract now known as the Fort Brooke military reservation was occupied under the direction of the Secretary of War
55 two years before the passage of the act upon which the claim of the Hackley heirs is predicated.

In further support of his views, counsel recites the history of Camp Stambaug in Wyoming Territory.

It appears that, in 1870, the Secretary of War established said military post, which was laid off as a reservation and included all the territory within one mile of the flagstaff erected at the post. In 1881, the Secretary of War notified the Secretary of the Interior that said post, being no longer needed for military purposes, had been discontinued. In said communication, he expressed the opinion that, inasmuch as there had been no formal reservation of the lands included therein by the President, the same might be restored to the public domain, as other lands, without the consent of Congress.

The Secretary of the Interior concurred in this opinion, and said lands were treated as having been restored to the public domain by the act of abandonment, and the subsequent notification on the part of the Secretary of War.

I am unable to see wherein the correspondence above referred to sustains the contention of counsel, for while it may be true that a military post, established by the Secretary of War, may be restored to the public domain with less formality than if it had been reserved by a formal order of the President, still, the Secretary of War had authority to establish Cantonment Brooke, and by virtue of such establishment, the lands upon which it was located were not subject to entry so long as unrelinquished.

Where a military post or cantonment is established upon the public domain, whether the same be for temporary purposes, or permanent occupation by the military, if it be done by competent authority, the lands included therein are not subject to entry until properly restored to the public domain.

If the Secretary of War has the authority to establish a military post, it follows that during the time that the lands included therein are occupied for military purposes, they are not subject to be disposed of under the pre-emption laws. In the case of Wilcox *vs.* Jackson (13 Pet., 498) it is held as follows:

The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War Department. Hence, we consider the act of the War Department in requiring this reservation to be made, as being in legal contemplation the act of the President; and, consequently, that the reservation thus made was in legal effect a
56 reservation made by order of the President, within the terms of Congress.

It is further held in said case as follows:

But we go further, and say that, whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law or proclamation, or sale, could be construed to embrace it or to operate upon it, although no reservation were made of it.

The counsel for the Hackley heirs further contend that the cantonment did not cover the whole of the one hundred and sixty acres to which Hackley's claim attached, and that the appropriation by the military did not, therefore, extinguish his claim to that portion which lay outside of the limits of the cantonment.

Counsel insists that inasmuch as the buildings erected for the accommodation of Cantonment Brooke were located upon what is now known as lot 9 of said tract the said encampment was therefore limited to the spot upon which said buildings were erected.

This is untenable, for the reason that it is necessary for the convenience of the military to appropriate a considerable area of the public domain for wood, water and other purposes, and the fact that Hackley was ejected from his entire claim was itself an appropriation thereof.

In accordance with the views thereinbefore expressed, therefore, the claim of the Hackley heirs is denied.

The provisions of the act just mentioned have no application in adjusting any claim made to the land in controversy, for the reason that said lands had been segregated and occupied by troops in cantonment, for two years, at the date of its passage.

It seems to me that the proper disposition of said lands if governed by the provisions contained in the act of August 18, 1856 (Stat., 87), which provide that all lands heretofore reserved for military purposes in the State of Florida, etc., "shall be disposed of and sold in the same manner and under the same regulations as other public lands of the United States."

For the purposes of the present inquiry, it is not necessary to go into the details of the history of the Fort Brooke military reservation until the time of its final restoration to the public domain in January, 1883.

On March 22, 1883, the local officers at Gainesville, Florida, received an approved diagram of the subdivision into seven lots of the land formerly embraced in said reservation. On April 2,
57 thereafter, said officers were directed to allow no entries upon any land within said reservation. In the interval which elapsed between the 22nd of March and the 2nd of April, 1883, said lands were open to entry unless it was incumbent upon the commissioner to place the lands upon the market in the manner provided in the act of 1846, which contains the following provision in the fifth section thereof (section 2455 R. S.):

It shall and may be lawful for the Commissioner of the General Land Office to order into market, after due notice without the for-

mality and expense of a proclamation of the President, all lands of the second class, though heretofore unproclaimed and unoffered, and such other isolated or disconnected tracts or parcels of unoffered lands, which, in his judgment, it would be proper to expose to sale in like manner; provided, that public notice of at least thirty days shall be given by the land officers of the district — such lands may be situated, pursuant to the direction of the Commissioner aforesaid (9 Stat., 51).

It will be observed that the foregoing provision is discretionary with the Commissioner, inasmuch as it is a matter left to his judgment. Besides, it was the practice of the department, prior to October, 1885, to recognize the validity of homestead and pre-emption claims made immediately upon the filing of township plats; and in cases also where lands have been restored to the public domain by acts of forfeiture, homestead and pre-emption claims have been allowed to take effect immediately after the passage of such acts.

On the 2nd of October, 1885, Commissioner Sparks, with the approval of Secretary Lamar, issued instructions to registers and receivers (4 L. D., 202), which provides as follows:

Hereafter when approved plat of the survey of any township is transmitted to you by the surveyor general, you will not regard such plat as officially received at and filed in your office, until the following regulations have been complied with:

First. You will forthwith post a notice in a conspicuous place in your office, specifying the township that had been surveyed and stating that the plat of survey will be filed in your office on a day to be fixed by you and named in the notice, which shall be not less than thirty days from the date of such notice, and that on and after such day you will be prepared to receive applications for the entry of lands in such township, etc.

It seems that the foregoing instructions were issued for the reason that prior to said date, it had been the practice of the depart-
58 ment to recognize the validity of filings and entries immediately after the plat of survey, made by the surveyor general, was received at the local office. If, before that time, the reception of the plat of survey by the surveyor general to the local officers was regarded as a sufficient reason for the acceptance of filings and entries, much more would the reception of a plat of survey sent to the local office by the Commissioner of the General Land Office be regarded as such.

In the case at bar, the plat of survey sent by the Commissioner of the General Land Office was received at the local office on the 22nd day of March, 1883.

It may be that the land included within the Fort Brooke military reservation is an isolated and disconnected tract within the meaning of the act of 1846, but when such a tract belongs to the public domain, it is, nevertheless, open to settlement under the public land laws at all times before the Commissioner proceeds with the disposition of the same, under the provisions of said act. If, therefore, a

qualified entryman applies to make homestead entry upon such a tract, while it belongs to the public domain and before any steps have been taken by the Commissioner to dispose of the same under the authority given him by said act, his application should be allowed. After such an entry has been allowed and such a tract has been in that manner segregated, the Commissioner has no authority to dispose of it in any other manner.

The discretionary power vested in the Commissioner by said act of 1846, must be exercised before the segregating of the land. After an entry has been allowed, the rights of the entryman become vested and the provisions of the above mentioned act must be construed in harmony with them.

In vol. 2, L. D., 606, Secretary Teller, in treating of the question relating to the Fort Brooke military reservation, comes to the conclusion that the entry and filings made thereon, after the 22nd of March, 1883, were premature. It is held in said case that:

The act of 1856 and section 2364 must be read together.

Together they make the general law for the disposition by you of these Florida military reservations, and claimants are charged with notice of the whole law upon the subject.

Section 2364 of the Revised Statutes reads as follows:

Whenever any reservation of public lands is brought into market, the Commissioner of the General Land Office shall fix a minimum price not less than one dollar and twenty-five cents per acre, below which such lands shall not be disposed of.

59 It will be observed that the above recited act is limited in its terms to reservations "brought into market."

The act of 1856, provides that military reservations in Florida after being placed under the control of the General Land Office, are "to be disposed of and sold in the same manner and under the same regulations as other public lands in the United States."

Now, "public lands in the United States" are disposed of in various ways. On July 2d, 1864, the date of the passage of the act embodied in section 2364, public lands were disposed of under the homestead and pre-emption laws, and, when the Commissioner so directed certain lands were brought into market and sold to the highest bid-er.

Said section being limited by its own terms to the manner of disposition last mentioned, has no application except in those cases where the Commissioner in the exercise of his discretion under the law, had brought lands into the market to be sold at public auction. This construction is obvious unless it be held that the act of 1856, contemplates that no military reservation in Florida shall be disposed of in any other way than by public sale. I am of the opinion that the principle of construction employed in the decision above mentioned is untenable.

Under the authority vested in the Commissioner of the General Land Office by the acts of 1846 and 1856, and by section 2364 of the Revised Statutes, he might have brought into market and disposed of the same at public auction, the lands included in the Fort Brooke

military reservation, but he was not compelled to do so and up to this time has made no effort to have the same disposed of in that manner. It was legitimate, also, to dispose of said reservation under the homestead and pre-emption laws, and when the same was restored to the public domain, as hereinbefore mentioned, it was subject to entry under said laws. Section 2364 of the Revised Statutes, has no application to the disposition of the same unless the Commissioner of the General Land Office, in the exercise of his discretion, has seen proper to bring said reservation into market.

The Fort Brooke military reservation, at one time, included all the lands within sixteen miles square, and in 1883 it had been reduced by former relinquishment to less than one hundred and fifty acres. Almost the whole of said original reservation has been disposed of under the homestead and pre-emption laws. The fact that the land in controversy has become very valuable is no reason for the introduction of a different rule from that which has been
60 uniformly observed by the department in the disposition of other reservations prior to the act of 1884.

I am of the opinion, therefore, that the lands in controversy were open to entry from March 22 to April 2d, 1883, the day on which the local officers were instructed to allow no entries on the same.

The claims of all the other parties in interest are based upon applications made on and subsequent to the 22d day of March, 1883. The homestead entry of E. W. Carew, the husband of the claimant Mrs. L. W. Carew, was the first application made after the lands were restored to the public domain, and unless there was sufficient legal reason for the rejection, should have been allowed.

In the departmental decision complained of it is held a- follows:

The finding of the local officers and your office, that the entry of Carew and the settlement of Mather were not made in good faith, is supported by the evidence, and their claims were properly rejected.

I have searched the record with a view of ascertaining, if possible, the disclosures therein that go to impeach the good faith of E. S. Carew, and I have failed to find any admissable or competent evidence that justifies the conclusion reached in said decision.

The rejection of the claim of Mrs. L. W. Carew seems to have been predicated upon the testimony of J. T. Lesley, who appeared as witness in behalf of the city of Tampa.

Lesley testified that Senator Call notified him that he, the Senator, had instructed E. S. Carew to make pre-emption or homestead (claim) upon the reservation, and had instructed one Carlisle to make cash entry on the same, in order to secure it for the people of Tampa. He also informed witness that he had instructed Dr. Carew to draw upon him, Call, for the money. This Carew did. Witness paid the draft drawn by Carew upon Senator Call. A few days afterward Carew informed witness that he had received a telegram from Senator Call to make homestead entry upon said reservation and to draw upon him, Call, for the money. Carew told witness that he would turn over the homestead or pre-emption to the people of Tampa or would continue

the same, or prove it up. Witness explained to Carew why it was that he was requested to make the homestead (entry), which was to forestall speculation until Congress could pass an act donating it to the city of Tampa. Witness and others thought best to have the reservation homesteaded and to let the town have what it
61 wanted. Witness explained to Carew, who was interested in the scheme, what amount witness thought the city of Tampa would be satisfied with. Witness after consultation with parties interested and members of the town council, thought it best that, if Dr. Carew would agree to carry out, in good faith, such an arrangement and divide up the reservation as per agreement, he, Carew, should continue on the place. Witness told Dr. Carew, that, and Carew acquiesced in the arrangement.

Carew, witness and others, intended at the end of six months to commute this land, put it under the commutation act, and divide it out among the parties interested as per agreement. Witness afterwards called upon Carew to have an interview about the matter, and, to his astonishment Carew refused to do anything.

Carew then said he was the only person who had any rights and that he intended to retain them. Witness answered that while Carew might defeat the town of Tampa and the "balance of us" from getting this land, or any part of it, witness thought "we would be able to do the same with him," having no disposition to do anything of the kind but simply asking that the agreement thus made be carried out in good faith.

Carew refused to do so. Carew remained in the house secured for him up to the time of his death; his widow has lived in the same house ever since. Witness had no controversy or correspondence with Carew on or before the 22nd day of March, 1883, relative to the reservation or homestead thereon. According to the agreement witness had with Carew, the reservation was to be divided into six parts: Carew to have one; the town of Tampa one; W. B. Henderson one; S. M. Sparkman one; J. A. Henderson one; and witness one. Tampa was to make its selection and the balance to be divided equally among the other five. Parties interested were to pay all the expenses and Dr. Carew was to comply with the homestead law in regard to residence and cultivation.

After the failure to secure the land in 1883, there was a scrip entry made upon it by W. B. Henderson, and by him the same proposition was made to the city of Tampa. Witness owned an interest in this scrip after that time; witness's son now owns said interest.

Carew died in 1886.

It will be observed that at the time of the trial Carew had been dead several years, and that the witness was an interested party in the transaction in regard to which he testified.

In the statute of Florida, chap. 101, sec. 24, it is provided as follows:

No person offered as a witness in any court or before any
62 officer acting judicially, shall be excluded by reason of his interest in the event of the action or proceedings, or because he is a party thereto; provided, however, that no party to such action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any transaction, or communication between such witness and the person at the time of such examination deceased, insane or lunatic, against the executor, administrator, heir-at-law, next of kin, assignee, or committee of such insane or lunatic, etc.

Besides it will be observed that the witness testified that he and Carew were parties to a scheme which involved perjury on the part of the witness himself. When Dr. Carew made his homestead entry he was compelled to swear that the same was done not for the benefit of any other person, persons, or corporation. He was also compelled to swear that he was " not acting as agent for any person, corporation or syndicate in making such entry, nor in collusion with any person, corporation or syndicate to give them the benefit of the land entered or any part thereof," etc.

The scheme testified to by the witness was utterly inconsistent with the affidavit which had to accompany the homestead application of Carew, and the moral culpability implied on the part of a witness who, according to his own showing, testified in a revengeful spirit, because the other party to such a contract refused to carry out the same is sufficient to discredit his testimony in the absence of any other legal reason.

In my opinion the testimony of J. T. Lesley, in so far as it goes to impeach the good faith of E. S. Carew, is inadmissible from a legal standpoint, and harmless because of its other infirmities. There being no other obstacle in the way of the claim of Mrs. Carew, I am of the opinion that it should be allowed.

The legislature of Florida in the year 1889 merged the towns of Tampa and North Tampa into one corporation and extended the limits of the city so as to include the reduced military reservation, and upon this legislative enactment the city of Tampa bases its claim to the said reservation to be used as a public park and for other purposes.

The testimony failing to show that any considerable portion of the same was used and occupied for trade and business, the said claim was properly rejected in the opinion under review.

63 To avoid confusion, I note that by the diagram approved by your office and transmitted to the local office in 1883, Fort Brooke was divided into seven lots numbered 8, 9, 10, 12, 13, 14 and 16. According to the public survey, lots 8, 9 and 10 fall within sec. 24 T. 29, S. R. 18 E.; lots numbered 12, 13 and 14 fall in sec. 19, T. 29, S. R. 19 E.; and lot numbered 16 falls within sec. 18, T. 29, S. R., 19 E.; Gainesville, Florida.

On the 22d day of March, 1882, the day on which the lands included in the Fort Brooke reservation were open to entry, Louis Bell was residing upon that subdivision known as lot No. 8, sec. 24, T. 29, S. R., 18 E., intending to make the same his permanent home. He was qualified and sought to assert his settlement rights by an application to file prior to the order in which the local officers were directed to allow no entries upon said lands. The claim of the heirs of Bell might properly be rejected upon the technical ground that the land in controversy was, at that time, included in the homestead entry of Carew, but inasmuch as said homestead claim was subsequently limited so as to exclude the lot or subdivision upon which Bell resides, and inasmuch as there is no other claimant to said legal subdivision who has a superior right to Bell, and for the further reason that his good faith calls for the exercise of the supervisory power of the department, the same will be upheld, but limited to said subdivision.

The telegram sent from your office on the 2d of April, 1883, to the local officers directing them to allow no entries upon the lands within said reservation, was doubtless made upon the idea that said lands could not be disposed of otherwise than by being brought into market and sold at public auction.

There being now no reason why said order should remain longer in force, especially in view of the fact that the claims of Carew and Bell, both of which were of record or offered prior to the date of said order, include the most valuable lands in the reservation aforesaid, the same is hereby revoked.

The claims of Julius Caesar to lot No. 13, and of Martha Stillings, wife and heir of Andrew Stillings, deceased, to lot No, 12 of sec. 19, T. 29, S. R. 19 E., and that of Frank Jones to lot No. 16, sec. 18, T. 29, S. R. 19 E., are in the same condition as that of Louis Bell, with the exception that said claims were asserted subsequent to the date of the order from your office directing that no entries be allowed upon the lands of said reservation.

The settlement rights of Caesar, Stillings and Jones had
64 attached prior to the date of said order, and were simply held in abeyance by it. You will, therefore, direct that their claims be allowed to the lots or subdivisions upon which they respectively resided, should there be no intervening reason in either case for a different disposition of said lots.

The claim of W. B. Henderson to locate, Gerard scrip on lots Nos. 8 and 9, sec. 24, T. 29, S. R. 18 E., must be denied on account of its conflict with the prior rights of Louis Bell and Mrs. Carew.

The declaratory statement of Daniel Mather was properly rejected in the light of the record which discloses the fact that he never contemplated making his permanent home upon any land inside the Fort Brooke reservation and that he abandoned his claim in 1885.

The remaining lot in said reservation, to-wit: lot No. 14, sec. 19, T. 29, S. R. 19 E., was settled upon by E. B. Chamberlain on the 7th of July, 1883, and upon that settlement he bases his claim.

The order emanating from your office directing the local officers to allow no entries, was no bar to initiating a settlement claim, and said order having been herein revoked, his claim will be allowed to said lot, should there be no other legal obstacle in the way of his perfecting the same.

It will be observed that I have recognized the settlement rights of Bell and others, in this case, and the question might arise that since the settlement of Bell, for instance, was made prior to the homestead entry of Carew, and his rights thereunder were asserted by him the time prescribed by law, that his claim would be superior to that of Carew, whose settlement began from his entry.

A settler is defined to be:

A person who intending to initiate a claim under any law of the United States, for the disposition of the public domain, does some act connecting himself with the particular tract claimed, said act being equivalent to an announcement of such intention, and from which the public generally may have notice of his claim. (2 L. D., 628.)

In the light of this definition, the record discloses no act on the part of Mr. Bell, or the other claimants, which connects him or any of them, "with the particular tract claimed," outside of the lots or subdivisions upon which they respectively reside, until after the same was covered by Carew's entry.

I recognize the rulings of the department that where an entryman is claiming a quarter-section of land and has made settlement upon one forty-acre tract of the quarter-section which he claims, that his settlement rights will be construed to cover the whole of the technical subdivision.

This rule, however, is limited by the condition that it must appear that the entryman intended to claim the particular technical subdivision which embodies the tract upon which he has made settlement.

If it should appear, for instance, that a person has made a settlement upon one-quarter of some particular section of public land, and intends to claim a portion also of some other section, then the rule above referred to does not apply.

In order to avail himself of such a claim his acts of settlement must cover the whole tract.

Now the Fort Brooke military reservation includes portions of three separate sections of public land. A claimant, therefore, who seeks to acquire title to the whole of said reservation, must show such acts of settlement as extended to the entire tract.

But it may be suggested that the legal subdivision upon which Bell resides, according to general public survey, is the same as that upon which Carew resides, and that under a proper construction of the rule hereinbefore discussed, the settlement rights of Bell should be held to extend at least to cover the lots upon which Carew resides.

The reply is that Mr. Bell has never limited his claim to any technical quarter-section of land, and the rule applies to such claimants only.

The decision under review, for the reasons hereinbefore mentioned, is set aside and you will direct that the lands formerly included within the Fort Brooke military reservation be disposed of in accordance with this opinion.

Herewith are returned the papers.

Very respectfully, HOKE SMITH, *Secretary.*

66 EXHIBIT "K."

F. L. C. H. B. P. G. B. G.
G. B. G.
DEPARTMENT OF THE INTERIOR, V. B.
WASHINGTON, *March* 8, 1898. L. R. S.

3206—1897.

JOSEPH W. BILBIE ET AL.—On Petition.

The Commissioner of the General Land Office.

SIR: Joseph W. Bilbie and numerous other citizens of Hillsborough county, Florida, and alleged residents upon lands in said county, which were formerly part of the Fort Brooke military reservation in said State, have filed in this department a petition asking that suit be instituted to set aside certain patents heretofore issued for said lands.

Said petition was duly entertained, returned for service, and the parties in interest have filed their respective answers.

By departmental decision of July 24, 1894, (on review), 19 L. D. 48, certain lands in said reservation were awarded to the parties in interest, and patents issued in due course as follows:

To the heirs of Lewis Bell, deceased, lot 8, sec. 24, T. 29, S.

To the widow of Edward S. Carew, deceased, lots 9 and 10, same section, township and range.

To Frank Jones, lot 16, sec. 18, same township and range.

To Martha Stillings (now Turner), widow and heir of Andrew Stillings, deceased, lot 12, sec. 19, same township and raige.

To Julius Caesar, lot 13, sec. 19, same township and range.

To E. B. Chamberlain, lot 15, same section, township and range.

These are the patents which the petitioners seek to vacate.

The history of the litigation and administrative procedure in the Interior Department, which was finally closed, so far as lies within this jurisdiction, by the issuance of the aforesaid patents, is briefly as follows:

Under instructions from the War Department in March, 1824, certain lands in the State of Florida, were occupied by the United States troops in cantonment, and on December 10, 1830, the Fort Brooke military reservation, covering an area of sixteen miles
67 square, was established by executive order. After various restrictions and modifications the remainder, containing 148.11

acres, was on January 4, 1883, duly relinquished, in writing by the Secretary of War, and, on the 17th of March, 1883, a plat of the tract so relinquished was sent to the local office at Gainesville, Florida, with Commissioner McFarland's letter of that date, as follows:

Herewith inclosed I transmit for the files of your office an approved diagram of the subdivision into lots of the late Fort Brooke military reservation in Florida, in secs. 18 and 19, T. 29, S. R. 19 E., and sec. 24, T. 29, S. R. 18 E., relinquished by the Secretary of War to this department in writing under date January 4, 1883.

The plat referred to was received at the local office at 4:45 o'clock p. m., March 22, 1883. On that day, at 4:50 o'clock p. m., Edward S. Carew made homestead entry, covering the whole tract.

On April 2, 1883, the Commissioner of the General Land Office instructed the local officers, by telegram, to allow no entries upon and (any) land within said reservation.

On December 17th, 1883, Commissioner McFarland, considering the status of said land and the law applicable thereto, held that the land released from reservation was, by the act of August 18, 1856, (11 Stat. 87), placed under the control of the General Land Office for disposal, that the manner of disposition therein provided for was modified by the act of July 2, 1864, (R. S. 2364), and the act of August 3, 1846, (R. S. 2455), and that it was not subject to entry under the homestead and pre-emption laws, nor scrip location.

Pursuant to said decision, on January 22, 1884, said Commissioner held for cancelation the homestead entry of Carew and the pre-emption declaratory statements of Clifford Herrick and Lewis Bell.

On appeal to the department, Mr. Secretary Teller, on May 16, 1884, (2 L. D. 606), affirmed the Commissioner's decision, holding that the entries and filings upon the tracts in question were premature, and did not foreclose further action by the Commissioner under the provisions of section 2364 of the Revised Statutes, and said:

I am further of the opinion that section 2364 of the Revised Statutes is not inconsistent with said act of August 18, 1856, and that, as it is a general statute, without restriction, it applies to the disposition and sale of reservations in Florida as elsewhere.

You sent the plat to the local office to be filed, but you neither instructed the officers to open the land for settlement nor to
68 withhold them. Perhaps, you might have disregarded the provisions of section 2364 (considering them only as directory), and instructed the local officers to receive entries and filings for the tracts. In the absence of any instructions, I do not think the filing of the plat of itself foreclosed any further action on your part, and precluded you from applying to the lands the provisions of that section intrusted to your office.

The act of 1856 and section 2364 must be read together. Together they make the general law for the disposition by you of these Florida military reservations, and claimants are charged with notice of the whole law upon the subject.

On May 10, 1887, (5 L. D. 632), Acting Secretary Muldrow considered the application of Daniel Mather to make pre-emption entry of lots 8, 9 and 10 on said reservation, on the said Mather's appeal from the rejection thereof, and held that the disposition of lands in said reservation was governed by the act of July 5, 1884, (23 Stat. 103), and that said act protected the rights of settlers prior to January 1, 1884, who were qualified to make homestead entry.

On June 4, 1887, the Honorable Wilkinson Call, a United States Senator from Florida, filed in the department a request that the said case of Daniel Mather be reconsidered, for two reasons—one of which was that a bill had been favorably reported by the Committee on Public Lands to donate said reservation to the town of Tampa.

The attention of Mr. Secretary Vilas was called to this report, whereupon he ordered a hearing for the purpose of determining whether said land is included within the limits of an incorporated town, or occupied for the purposes of trade and business, and to determine the character of Mather's settlement, and whether it was simply as an occupant by permission of the military authorities, and to this end, all the papers before the department in the case of Mather and also in the case of Lizzie W. Carew, were returned.

A hearing was had, at which all the conflicting alleged interests were heard, and, on November 25, 1892, (15 L. D. 487), Mr. Secretary Noble rendered a final decision on the record, rejecting all of the claims to the land, among which were the claims of E. S. Carew, Daniel Mather, Andrew Stillings, Julius Caesar, Louis Bell, E. B. Chamberlain, the heirs of R. J. Hackley, deceased, and also the mayor and city council of Tampa. It was held that the land had never been thrown open to settlement and entry, and said:

69 Under the law as it now stands, said reservation will be disposed of whenever the Secretary of the Interior is of the opinion the public interests so require, under the provisions of said act of 1884. * * * Action looking to the disposal of said land will be deferred until you are further advised by this department.

Motions for review of this decision were filed, upon the consideration of which the aforesaid decision of Secretary Smith of July 24, 1894, was rendered, wherein it was held from *from* the time the aforesaid plat was received in the local office, on March 22, 1883, until April 2, 1883, when the telegram was received directing that no entries be allowed, said land was subject to entry as other public lands, of the United States; that the entry was a valid appropriation of the land, except as to prior adverse subsisting settlement rights, which settlement rights were recognized and award made, as heretofore appears, and it was specially held that there was no competent evidence in the record tending to show that the entry of Carew was made in bad faith.

The pertinent legal conclusions are set forth in the syllabus of said decision as follows:

The act of July 5, 1884, providing for the disposition of abandoned military reservations, is limited in its application to military reser-

vations that were in existence at the date of its passage, or that should be thereafter created.

The disposition of a military reservation in Florida, abandoned and restored to the public domain prior to the passage of the act of July 5, 1884, is governed by the provisions of the act of August 18, 1856, and under said act the Commissioner of the General Land Office was authorized to dispose of such lands either at public sale or under the homestead and pre-emption laws.

It is submitted by the petitioners that these lands have been disposed of without authorization of law, and the various claims, especially the Carew claim, conceived and initiated in fraud, and perfected by false pretense and perjury.

The act of August 18, 1856, (*supra*), provided:

That all public lands heretofore reserved for military purposes in the State of Florida, which said lands, in the opinion of the Secretary of War, are no longer useful or desired for such purpose, or so much thereof as said Secretary may designate, shall be, and are hereby placed under the control of the General Land Office, to be disposed of and sold in the same manner and under the same regulations as other public lands of the United States.

70 The sixth section of the act of June 12, 1858, (11 Stat. 336), provided:

That all the existing laws or parts of laws which authorize the sale of military sites, which are or may become useless for military purposes, be, and the same are hereby repealed, and said lands shall not be subject to sale or pre-emption under any of the laws of the United States: Provided, further, that the provisions of the act of August eighteenth *eight* (eighteen) hundred and fifty-six, relative to certain reservations in the State of Florida, shall continue in force.

The act of July 2, 1864 (*supra*), provided:

That whenever any reservation of public lands shall be brought into market under existing laws, it shall be lawful for the Commissioner of the General Land Office to fix a minimum price, not less than one dollar and twenty-five cents per acre, below which said lands shall not be disposed of.

This act was carried into section 2304 of the Revised Statutes, but there made to read, not that "it shall be lawful for the Commissioner," &c., but the Commissioner "shall fix a minimum price, not less than one dollar and twenty-five cents per acre below which such lands shall not be sold."

The act of July 5, 1884, (23 Stat. 103), provides:

That whenever, in the opinion of the President of the United States, the land-, or any portion of them, included within the limits of any military reservation heretofore or hereafter declared have become or shall become useless for military purposes, he shall cause the same or so much thereof as he may designate, to be placed under the control of the Secretary of the Interior, for disposition as hereinafter provided, and shall cause to be filed with the Secretary of the Interior a notice thereof.

Section 2 of this act provides for the manner of disposition, which is "at public sale to the highest bidder for cash."

Provided, that any settler who was in actual occupation of any portion of any such reservation prior to the location of such reservation, or settled thereon prior to January first, eighteen hundred and eighty-four, in good faith, for the purpose of securing a home and of entering the same under the general land laws, and has continued in such occupation to the present time, and is by law entitled to make a homestead entry, shall be entitled to enter the land so occupied, not exceeding one hundred and sixty acres, in a body, according to the Government surveys and subdivisions. Provided further, that said lands were subject to entry under the public land laws at the time of their withdrawal.

71 Section 4 provides:

That the provisions of the act of August eighteenth, eighteen hundred and fifty-six, relative to military reservations in the State of Florida, and the sixth section of the act of June twelfth, eighteen hundred and fifty-eight, relative to the sale of military sites, be and the same are hereby, repealed.

This legislation may be summarized as follows:

The act of 1856 provided that military reservations in the State of Florida, no longer useful for that purpose, should be placed under the control of the General Land Office to be disposed of and sold in the same manner and under the same regulations as other public lands of the United States.

The act of 1858 did not change or modify the act of 1856.

The act of 1864 (section 2304 R. S.), made it lawful for the Commissioner of the General Land Office to fix a minimum price, not less than one dollar and twenty-five cents per acre, below which any reservation of public lands brought into market should not be disposed of, and the revision (sec. 2304) made mandatory what was by the original act permissive and discretionary.

The act of 1884 provided for the disposition of all such lands at public sale to the highest bidder for cash, but protected the rights of settlers in actual occupation prior to the location thereof, or who settled thereon prior to January 1, 1884, in good faith, for the purpose of securing a home and of entering the same under the general laws, and had continued in such occupation to the date of the act. Provided further, "that said lands were subject to entry under the public land laws at the time of their withdrawal," and the fourth section of said act specially repealed the aforesaid act of 1856.

Departmental decision of July 24, 1894, does not refer to the fact that the act of 1884 repealed the act of 1856, but whether such fact was overlooked or considered and not thought material, it is not now believed that the fact of such repeal rendered the disposition of the lands, as directed by said decision, unlawful or erroneous.

It is reasonably clear that prior to the passage of the act of 1884, the act of 1856 was the only legislation governing the disposition of lands occupying the status of those here involved. It was a

special act providing for the disposition of lands theretofore reserved for military purposes in the State of Florida, and that disposition was to be in the same manner and under the same regulations as other public lands of the United States. This included, at the date the lands in the Fort Brooke military reservation
72 were placed under the control of the General Land Office, homestead entries and pre-emption filings.

The same purpose was again expressed by Congress in the act of 1858, continuing in force the provisions of the act of 1856.

The act of 1864 was a general act, and whether it be considered as permissive or mandatory, did not repeal or modify that act of 1856.

General statutes do not affect special ones, unless such is clearly the legislative intention, and no such intention here appears, either express or implied. Moreover, the fact that Congress saw fit to repeal the act of 1856, in 1884, is legislative recognition of the act at that time as existing law. If, therefore, rights had been lawfully acquired by homestead entry, and the proceedings of the land office had by virtue of authority of the act of 1856, it was not unlawful to allow those rights to be perfected under the homestead law, even though the act which authorized the disposition of the land under the homestead law, had been repealed.

At the time of the filing of the township plat as aforesaid, at the local office, the Land Department had full jurisdiction of the land, and was authorized, as has been seen, to dispose of the same under the homestead and pre-emption laws. Under the practice at that time, a township plat was treated as officially received and filed at the moment of time it reached the local office, and homestead entries and pre-emption filings were recognized as valid made immediately thereafter. This practice was changed in October, 1885, (4 L. D. 202), but it was the practice in force March 22, 1883. It results that, at that time the General Land Office having full authority to dispose of said lands under the homestead law, the entry of Carew was such an appropriation thereunder that subsequent legislation relating to the disposition of like lands would not operate upon it, and this is true regardless of the fact that part of the land was afterwards awarded to other parties in the adjustment of equitable priorities.

On the question of the alleged fraud in making the entry, it may be said that, conceding the United States to be under such obligations to the petitioners as would authorize it to institute a suit for their benefit, it is not believed that such suit could be successfully maintained even though the fraud was perpetrated, as alleged.

It appears that the charge now made, that Carew and other parties entered into a conspiracy to defraud the Government of this land, was specifically considered by the department in its decision
73 of July 24, 1894, (*supra*), and it was therein found that said entry was made in good faith, and that the evidence did not establish the charge of conspiracy.

Whatever difference of opinion might exist as to the correctness of that finding, it is now conclusive of that issue, the land having been patented in pursuance of that decision. The department is without jurisdiction to reverse it, and inasmuch as it is a finding on a question of fact, the courts will not review it. Fraud is a mixed question of law and fact, but the department has here found that the claimed facts upon which the alleged fraud rested did not exist.

The general allegation by the petitioners of fraud in the submission of final proof is not sustained by the record.

Moreover, it does not appear that the United States is under any such obligation to the petitioners as would enable it to maintain a suit for their benefit.

The Supreme Court of the United States, in the case of The United States *vs.* San Jacinto Tin Company (125 U. S. 285) says:

We are of opinion that since the right of the Government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the Government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud which would render the instrument void, the fraud must operate to the prejudice of the United States; and if it is apparent that the suit is brought for the benefit of some third party, and that the United States has no pecuniary interest in the remedy sought, and is under no obligation to the party who will (be) benefited to sustain an action for his use; in short, if there does not appear any obligation on the part of the United States to the public, or to any individual, or any interest of its own, it can no more sustain such an action than any private person could under similar circumstances.

There is nothing in connection with the proceedings had in the disposition of the land involved which has operated prejudicially on any legal or equitable right of the petitioners. They are mere squatters, and even if these patents were vacated, it does not
74 appear how they are to be benefited. In that event, the lands would have to be disposed of under the act of 1884, *supra*, which is at public sale to the highest bidder for cash.

Conceding for the sake of argument that the petitioners settled on said land prior to January first, eighteen hundred and eighty-four, in good faith, for the purpose of securing a home and of entering *a home and of entering* the same under the general land laws, and had continued such occupation to the date of said act of 1884, they would not be protected by the proviso to said act, for the reason that said lands were not subject to entry under the public land laws at the time of

their withdrawal, hence the provision in that act for the benefit of settlers has no application in the disposition of these lands.

Another obstacle in the way of a successful maintenance of a suit to vacate these patents lies in the fact, made to appear by affidavits and exhibits, that all or nearly all of the land so patented has been sold and conveyed to third parties. The presumption is that such parties are innocent purchasers for value and without notice of any defect in the title to the patentees, on account of fraud or other infirmity. Even if the patents were procured through fraud, unless they were absolutely void on that account, such purchasers would be protected by the courts.

The fraud here alleged, even if permitted to be shown in the courts after the proceedings had thereon in the Land Department, is not of the character that would authorize a vacation of the patents as against such purchasers. If the fraud as alleged were established, it would render the patents voidable only, and under such a patent innocent purchasers for value and without notice would take a perfect title.

It is not believed that the suit prayed for could be maintained.

The petition is dismissed, and the papers are herewith transmitted for the files of your office.

Very respectfully, C. N. BLISS, *Secretary.*

(L. & R. vol. 369, p. 373 *et al.*)

(Indorsed:) In the circuit court of the United States in and for the southern district of Florida, in chancery. Sallie Field Scott *et al.*, *versus* Lizzie W. Carew, *et al.* Bill of complaint. Filed this 31st day of December, A. D. 1900. E. O. Locke, clerk, by H. L. Crane, deputy clerk. Fleming and Fleming, William H. and George H. Lamar, Munford and Anderson, counsel for complainants.

75 The President of the United States of America to Lizzie W. Carew, W. W. Hampton, E. R. Gunby, M. G. Gibbons, M. M. Nelson, E. C. Beach, S. Y. Finley, and George W. Hall, defendants, Greeting:

You are hereby commanded and strictly enjoined that, laying all other business aside and notwithstanding any excuse, you personally be and appear before the judge of our circuit court for the southern district of Florida on the first Monday, the fourth day of February, A. D. 1901, wherever the court may then be, to answer a bill of complaint exhibited against you in said court by Sallie Field Scott, Eliza Madison Scott, Harriet B. Jones, Freeman Jones, Lucia Beverly Bernard, Hugh S. Morrison, Hackley Morrison, Elizabeth Madison Morrison, Sallie Hackley, Mary Hackley, Maria Hackley, Mary F. Hackley, Sallie Strachan Hackley, Alexander S. Hackley, Gertrude Hackley, Thomas H. Hackley, and Stephen P. Hackley, complainants, and to do further and receive what our said court shall have considered in that behalf.

And this you are not to omit under a penalty of five hundred dollars.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States at the city of Tampa, on the thirty-first day of December, 1900, and of the Independence of the United States one hundred and twenty-fourth.

[COURT SEAL.]

E. O. LOCKE,
Clerk U. S. Circuit Court,
By H. L. CRANE,
Deputy Clerk.

Defendants are to enter appearance at the clerk's office at Tampa on or before the fourth day of February, A. D. 1901, otherwise the bill may be taken *pro confesso*.

E. O. LOCKE, *Clerk,*
By H. L. CRANE, *D. C.*

(*Marshal's Return.*)

Received this writ on the 4th day of Jan'y, 1901, at Tampa, Florida, and executed the same by delivering a true copy to Lizzie W. Carew, E. R. Gunby, M. G. Gibbons, M. M. Nelson and E. C. Beach, and exhibiting the original to them personally at Tampa, Florida, on the 5th day of January, 1901.

JOHN F. HORR,
U. S. Marshal,
By JOHN R. WILLIAMS,
Dept. Marshal.

Received this writ at Ocala, Fla., on Jan. 9, 1901, and executed the same on or before Jan. 10, 1901, at Gainesville, Fla., by
76 delivering a true copy to the within named W. W. Hampton and S. Y. Finley, and in each case exhibiting this original writ.

JOHN F. HORR,
U. S. Marshal,
By D. E. PEACOCK, *Deputy.*

George W. Hall lives in Evansville, Wis., and consequently was not served.

J. R. WILLIAMS, *Deputy.*

Received this writ at Tampa, on January 4th, 1901, and failed to execute the same on George W. Hall by making a diligent search for him and could not find him in my district, this Jan'y 15th, 1901.

JOHN F. HORR,
U. S. Marshal,
By JOHN R. WILLIAMS.

(Indorsed:) Circuit court of the United States for the southern district of Florida. In chancery. Sallie Field Scott *et al. versus* Lizzie W. Carew *et al.* Subpœna Dec. 31, 1900, returnable Feb'y 4, 1901. Filed this 18th day of January, A. D. 1901. E. O. Locke, clerk, by H. L. Crane, deputy clerk.

Amendment to the Bill of Complaint in This Cause.

In the Circuit Court of the United States for the Southern District of Florida.

SALLIE FIELD SCOTT ET AL.
vs.
LIZZIE W. CAREW ET AL. } In Chancery.

Insert on page 32 in the prayer of said bill after the words: "to convey said lands to your complainants" the following: And that the said defendants be decreed to render a statement of all sales and conveyances made by them and each or any of them of portions of said lots 9 and 10 of section 24, T. 29, S. R. 18 E., and render an account of all monies, choses in action or other valuable consideration received by them for such sales and conveyances. And that they may be decreed to hold the same in trust for and to pay the same over to your complainants in such terms and conditions as may be agreeable to equity.

FLEMING & FLEMING,
WM. H. LAMAR,
GEO. H. LAMAR,
MUNFORD AND ANDERSON,
Complainants' Solicitors.

77 (Indorsed:) In the circuit court of the U. S., southern district of Fla. In chancery. Sallie Field Scott *et al. vs.* Lizzie W. Carew *et al.* Amendment to bill. Fleming & Fleming, Geo. H. and Wm. H. Lamar, Munford & Anderson, attorneys for complainants. Filed this 3rd day of January, A. D. 1901. E. O. Locke, clerk, by H. L. Crane, deputy clerk.

In the Circuit Court of the U. S. for the Southern District of Florida.
In Chancery.

SALLIE FIELD SCOTT, ELIZA MADISON SCOTT, HARRIET B. JONES, Freeman Jones, Lucia Beverly Bernard, Hugh S. Morrison, Hackley Morrison, Elizabeth Madison Morrison, Sallie Hackley, Mary Hackley, Maria Hackley, Mary F. Hackley, Sallie Strachen Hackley, Alexander S. Hackley, Gertrude Hackley, Thomas H. Hackley, and Stephen P. Hackley, Complainants,
vs.
LIZZIE W. CAREW, W. W. HAMPTON, E. R. GUNBY, M. G. GIBBONS, M. M. Nelson, E. C. Beach, S. Y. Finley, and George W. Hall, Defendants.

Bill to establish trust, etc.

To the clerk of said court:

The appearance of S. Y. Finley, M. M. Nelson and E. C. Beach, defendants in the above entitled cause by S. Y. Finley their attorney is hereby made in said cause; and this their appearance will be filed and entered by said clerk and oblige.

S. Y. FINLEY,
In Pro. Per. and as Solicitor for M. M. Nelson and E. C. Beach, Defendants Herein.

(Indorsed:) In the circuit court of the U. S. for the southern district of Florida. In chancery. Sallie Field Scott *et al.* vs. Lizzie W. Carew *et al.* The appearance of M. M. Nelson, E. C. Beach, and S. Y. Finley Filed this 30th day of January, A. D. 1901. E. O. Locke, clerk, by H. L. Crane, deputy clerk. S. Y. Finley for above defendants.

78 In the Circuit Court of the United States for the Southern District of Florida.

SALLIE FIELD SCOTT ET AL.
vs.
LIZZIE W. CAREW, W. W. HAMPTON, E. R. GUNBY, M. G. Gibbons, M. M. Nelson, E. C. Beach, S. Y. Finley, and George W. Hall, Defendants. } In Chancery.

Appearance of Defendants.

The clerk of said court will please enter this our appearance as attorneys for the defendants Lizzie W. Carew, W. W. Hampton,

E. R. Gunby, M. G. Gibbons, M. M. Nelson, E. C. Beach and George W. Hall, as of rule day in February, A. D. 1901, and oblige:
This February 4th, A. D. 1901.

W. W. HAMPTON,
GUNBY & GIBBONS,
H. S. HAMPTON,
Solicitors for Defendants, Lizzie W. Carew, W. W. Hampton, E. R. Gunby, M. G. Gibbons, M. M. Nelson, E. C. Beach, and Geo. W. Hall.

(Indorsed:) In U. S. circuit court, southern district of Florida. Sallie Field Scott *et al. vs.* Lizzie W. Carew *et al.* Appearance. Filed this 2nd day of February, A. D. 1901. E. O. Locke, clerk, by H. L. Crane, deputy clerk. W. W. Hampton, Gunby & Gibbons and H. S. Hampton, sol's for def'ts.

In the Circuit Court of the United States for the Southern District of Florida.

SALLIE FIELD SCOTT ET AL.
vs.
LIZZIE W. CAREW ET AL. } In Chancery.

The clerk will please enter my appearance for E. R. Gunby and M. G. Gibbons, two of the defendants in the above entitled cause, and oblige.

WM. HUNTER,
Solicitor for Defendants.

(Indorsed:) In the circuit court of the United States for the southern district of Florida. Sallie Field Scott *et al. vs.* Lizzie W. Carew *et al.* Appearance of E. R. Gunby and M. G. Gibbons.
79 Filed this first day of February, A. D. 1901. E. O. Locke, clerk, by H. L. Crane, deputy clerk. William Hunter, solicitor for def'ts.

In the Circuit Court of the United States for the Southern District of Florida.

SALLIE FIELD SCOTT, ELIZA MADISON SCOTT, Harriet B. Jones, Froeman Jones, Lucia Beverly Bernard, Hugh S. Morrison, Hackley Morrison, Elizabeth Hackley Morrison, Maria Hackley, Mary Hackley, Sallie Hackley, Mary F. Hackley, Sallie Strachen Hackley, Alexander S. Hackley, Gertrude Hackley, Thomas H. Hackley, and Stephen P. Hackley	In Chancery.
vs.	
LIZZIE W. CAREW, W. W. HAMPTON, E. R. GUNBY, M. G. Gibbons, M. M. Nelson, E. C. Beach, S. Y. Finley, and George W. Hall.	

Bill for declaration of trust for relief, etc.

The demurrer of Lizzie W. Carew, W. W. Hampton, E. R. Gunby, M. G. Gibbons, M. M. Nelson, E. C. Beach, and George W. Hall, defendants, to the bills of complaint of Sallie Field Scott and others, the above named complainants.

These defendants severally by protestation not confessing all or any of the matters and things in the complainants' bills of complaint contained to be true in such manner and form as the same are therein set forth and alleged, do demur to the said bills and for cause of demurrer showeth, that:

1st. The alleged settlement and cultivation by Robert J. Hackley of the lands involved, in 1823 and 1824, did not confer upon or vest in the said Robert J. Hackley any right or lawful claim to any part of the lands described in complainants' bills, because such entry upon and possession of said land was without authority of law and in direct violation of the acts of Congress in force in the State of Florida at that time (act March 3, 1807, 2nd Stat. 445; act M'ch 30, 1822, 3rd Stat. 654).

2nd. The act of April 22, 1826, giving the right of pre-emption to settlers upon lands in Florida pursuant to the terms and provisions of the act of Feb. 5, 1813, did not and could not have a retroactive effect upon the unlawful possession of the unsurveyed lands described in complainants' bills by Robert J. Hackley, because the said acts referred to surveyed lands of the Government and
80 were not intended to confer pre-emption rights in unsurveyed Government lands.

3rd. The act of April 22, 1826, making the act of Feb. 5, 1813, operative in Florida, did not and could not have a retroactive effect upon the unlawful entry upon and possession of the lands described in complainants' bills by the said Robert J. Hackley, for the reason

that prior to the enactment of the law of April 22, 1826, the said lands had been entered upon and taken possession of by the Government, and the Government continued in possession thereof until the same were platted and offered for entry in 1883.

4th. It appears from the allegations of complainants' bills, and from the exhibits attached thereto, that Robert J. Hackley did not and could not in his lifetime conform to the requirements of section 1 of the act of Congress of April 22, 1826, and of section 2 of the act of Congress of Feb. 5, 1813, and therefore acquired no rights thereunder.

5th. Robert J. Hackley, having failed to acquire any vested rights in and to the lands described in complainants' bills, at the time of his death he had no interest in such lands which could descend to his heirs, the complainants herein.

6th. It does not appear from the allegations of complainants' bills that Robert J. Hackley was ever in lawful possession and occupancy of the lands described in said bills or any part thereof.

7th. It does not appear in and by the allegations of complainants' bills that a declaratory statement was filed by the administrator of the estate of Robert J. Hackley, or by his heirs, within three months after the receipt and filing at the district land office of the approved plat of the township embracing the alleged pre-emption settlement as required by sections 2266 and 2269 of the Revised Statutes of the United States, and a failure to file said declaratory statement within the time prescribed by the act of Congress was a forfeiture of any rights Robert J. Hackley or his estate or his heirs may have acquired by virtue of the alleged settlement upon said Government lands.

8th. It does not appear in and by the allegations of complainants' bills that the administrator of the estate of Robert J. Hackley, deceased, or his heirs, made proper proof and payment for the lands described and claimed therein within thirty months after the date prescribed therein respectively for filing their declaratory notices had expired, as required by sections 2267 and 2269, Revised Statutes of the United States, and a failure to make such proper proof
81 and payment within the period required by the act of Congress was a forfeiture of any rights that may have been acquired by virtue of the alleged settlement of Robert J. Hackley upon said land.

9th. The Secretary of the Interior having decided that Robert J. Hackley and his heirs and his legal representatives had not conformed to the provisions of the acts of Congress of the United States prescribing the requirements for acquiring pre-emption rights therein, and the same being a mixed question of law and of fact, the said decision of the said Secretary became final and cannot be reviewed by the courts.

10th. The Honorable Secretary of the Interior of the United States having decided, on March 8, 1898, as shown by Exhibit K to complainants' bills, that all of the defendants except Lizzie W. Carew,

the sole heir at law of the original patentee, were innocent, *bona fide* purchasers as shown by the evidence before the Interior Department, such fact became finally adjudicated and cannot now be reviewed by the courts, and the bills in this cause, as to all of the defendants except Lizzie W. Carew, should be dismissed.

11th. It appearing from the allegations in complainants' bills that patent issued on the 30th of July, 1896, and that the title of all of the defendants who purchased from Lizzie W. Carew was predicated upon said patent, such purchases are *bona fide* and legal in the absence of fraud, and complainants' bills should be dismissed as to all of the grantees of Lizzie W. Carew.

12th. There is no specific allegation of error of construction of law in complainants' bills, and in the absence of such specific allegation this suit can not be maintained and complainants' bills should be dismissed.

13th. It appears from the allegations of complainants' bills that patent issued for the lands involved in this suit, to Edmund S. Carew, on the 30th of July, 1896, more than four years before the filing of complainant's original bill, and this suit is barred by the statute of limitations of the State of Florida, par. 4, sec. 1294, of the Rev. Stats. of the State of Florida.

14th. The said bills of complaint do not contain any matter of equity whereon this court can ground any decree or give to the complainants or either of them any relief against these defendants or either of them.

Wherefore, and for divers other good causes of demurrer appearing in the said bills, the defendants do demur thereto and humbly demand the judgment of this court whether they shall be
82 compelled to make any other or further answer to the said bills, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

W. W. HAMPTON,
GUNBY & GIBBONS,
H. S. HAMPTON,
WM. HUNTER,
Solicitors for Defendants.

Certificate of Counsel.

STATE OF FLORIDA, }
Alachua County. }

I, W. W. Hampton, of counsel for the several defendants named in the foregoing demurrer, do herein and hereby certify that in my opinion the above and foregoing demurrer is well founded in point of law. This 20th day of February, A. D. 1901.

W. W. HAMPTON,
Of Counsel for Defendants Lizzie W. Carew, W. W. Hampton, E. R. Gunby, M. G. Gibbons, M. M. Nelson, E. C. Beach, and Geo. W. Hall.

STATE OF FLORIDA, }
Hillsborough County. }

Personally came before me Lizzie W. Carew, E. R. Gunby, M. G. Gibbons, M. M. Nelson and E. C. Beach, to me well known, each of whom being duly sworn, each for herself and himself deposes and says, that affiant is one of the defendants in this suit, and that the foregoing demurrer is not interposed for delay.

MRS. LIZZIE W. CAREW.
M. M. NELSON.
E. C. BEACH.
M. G. GIBBONS.
E. R. GUNBY.

Sworn to and subscribed before me on this 27th day of February, A. D. 1901.

[SEAL.] WILLIAM HUNTER,
Notary Public, State at Large.

STATE OF FLORIDA, }
Alachua County. }

Personally came before me W. W. Hampton, one of the defendants herein, who being duly sworn deposes and says that he
83 is one of the defendants in the above styled cause and that he is the duly authorized attorney for George W. Hall, one of the defendants, and that the said George W. Hall is absent from the State of Florida. Affiant further swears that the foregoing demurrer is not interposed for the purpose of delay.

W. W. HAMPTON.

Sworn to and subscribed before me on this 20th day of Feb'y, A. D. 1901.

[NOTARIAL SEAL.] E. E. VOYLE,
Notary Public, State of Florida at Large.

(Indorsed:) In circuit court of United States, 5th circuit, in and for southern district of Florida. In equity. Sallie Field Scott *et al. vs.* Lizzie W. Carew *et al.* Demurrer of def'ts to bill of compl't. Filed this 1st day of March, A. D. 1901. E. O. Locke, clerk, by H. L. Crane, deputy clerk.

In the Circuit Court of the United States for the Southern District of Florida. In Chancery.

SALLIE FIELD SCOTT, ELIZA MADISON SCOTT, HARRIET B. JONES, Freeman Jones, Lucia Beverly Bernard, Hugh S. Morrison, Hackley Morrison, Elizabeth Madison Morrison, Sallie Hackley, Maria Hackley, Mary Hackley, Mary F. Hackley, Sallie Strachen Hackley, Alexander S. Hackley, Gertrude Hackley, Thomas H. Hackley, and Stephen P. Hackley, Complainants,

vs.

LIZZIE W. CAREW, W. W. HAMPTON, E. R. GUNBY, M. G. GIBBONS, M. M. Nelson, E. C. Beach, S. Y. Finley, and George W. Hall, Defendants.

Bill for declaration of trust, etc.

The separate demurrer of S. Y. Finley, one of the defendants, to the bill of complaint and the amendment thereto in the above-entitled cause.

This defendant by protestation not confessing all or any of the matters and things in the above-named complainants' bill of complaint and amendment thereto contained, to be true in such manner and form as the same are therein set forth and alleged, does demur thereto and for cause of demurrer shows the following grounds of demurrer, viz:

1st. Because there is no equity in said bill of complaint and the amendment thereto as appears from the face thereof.

2nd. Because said bill of complaint and the amendment
84 thereto are vague, insufficient and indefinite and do not state facts sufficient to authorize a court of equity to take jurisdiction and to grant the relief prayed for against this defendant or any other relief.

3rd. Because said bill does not show any fraud or knowledge of fraud mistake, or illegality on the part of the defendant or his grantors as against said complainants or any facts constituting a fraudulent collusion to injure the complainants.

4th. Because said bill shows such laches as to preclude a court of equity from granting the relief prayed for, or any relief against this defendant.

5th. Because this suit is barred by the statute of limitation of the State of Florida, it appearing on the face of said bill and its exhibits that the alleged cause of action accrued more than four years before the commencement of this suit.

6th. Because it appears on the face of said bill and its exhibits that this defendant was adjudicated by the Land Department of the United States to be an innocent purchaser, and that this defendant derived title from the patentee of the United States by regular and legal devolution, without notice of any fraud, mistake or illegality

in the issuance of said patent on the part of this defendant or his grantors and that as such purchaser he is entitled to the protection of a court of equity, and that said bill and its amendment ought to be dismissed as against this defendant.

7th. Because said bill of complaint and its exhibits and the amendment thereto do not show such a right to the land therein mentioned as would authorize or require a court of equity to convert this defendant into a trustee for the complainants.

7th. Because the complainants' said bill and exhibits show that the Land Department of the United States has fully and finally adjudicated the matters set up in said bill, and said bill does not state facts sufficient to authorize a court of equity to review the said decision of the Land Department of the United States.

Wherefore this defendant prays to be dismissed from hence with his reasonable costs in this behalf expended.

S. Y. FINLEY,
In Pro. Per.

STATE OF FLORIDA, }
Alachua County. }

I, S. Y. Finley, counsel for myself in the above entitled cause do hereby certify that in my opinion the foregoing demurrer is well founded in law.

S. Y. FINLEY,
Att'y for Himself.

85 STATE OF FLORIDA, }
Alachua County. }

Personally appeared S. Y. Finley, one of the defendants in the above cause, who being duly sworn, on oath says that the foregoing demurrer is not interposed for the purpose of delay.

S. Y. FINLEY.

Sworn to and subscribed before me this the 28th day of February, 1901.

[NOTARIAL SEAL.]

E. C. F. SANCHEZ,
Notary Public, State at Large.

(Indorsed:) In the circuit court of the United States for the southern district of Florida. In chancery. Sallie Field Scott, *et al. vs.* Lizzie W. Carew *et al.* The separate demurrer of S. Y. Finley. Filed this 2nd day of March, A. D. 1901. E. O. Locke, clerk, by H. L. Crane, deputy clerk.

In the Circuit Court of the United States for the Southern District of Florida.

SALLIE FIELD SCOTT ET AL.
vs.
LIZZIE W. CAREW ET AL. } In Chancery.

Now comes the complainant in above entitled cause and set for argument the demurrers filed herein.

FLEMING & FLEMING,
WM. H. & GEO. H. LAMAR,
MUNFORD AND ANDERSON,
Solicitors for Complainants.

(Indorsed:) In the circuit court of the U. S. for the southern district of Florida. In chancery. Sallie Field Scott *et al. vs.* Lizzie W. Carew *at al.* Setting demurrers for argument. Filed this 29 day of March, 1901. E. O. Locke, clerk, by H. L. Crane, deputy clerk. Fleming & Fleming, Wm. H. & Geo. H. Lamar, Munford & Anderson, solicitors for complainants.

86 In the Circuit Court of the United States for the Southern District of Florida.

SALLIE FIELD SCOTT ET AL.
vs.
LIZZIE W. CAREW ET AL. } In Chancery.

Upon motion of the complainants in this cause, the defendants represented by their counsel, being present and not interposing objection thereto. It is ordered that complainants have leave to amend their bill by inserting on page 21 after the words "And that patent thereon was duly issued by the United States to Edward S. Carew, on July 30th, 1896, for lots 9 and 10, section 24, township 29 south range 18 east," the following paragraph:

Your complainants further allege that the said decision of the Secretary of the Interior awarding the right to enter the said land was based upon erroneous conclusions of law, and that said patent was issued illegally and in mistake of the law, and in violation of the rights of your complainants.

Done in open court this 29th day of November, 1901.

JAMES W. LOCKE, *Judge.*

(Indorsed:) In the circuit court of the United States for the southern district of Florida. In chancery. Sallie Field Scott *et al. vs.* Lizzie W. Carew *et al.* Order allowing amendment. Filed Nov. 29, 1901. E. O. Locke, clerk, by E. D. Dodge, deputy clerk.

In the Circuit Court of the United States for the Southern District of Florida.

SALLIE FIELD SCOTT ET AL.
vs.
LIZZIE W. CAREW ET AL. } In Chancery.

And now come the complainants and by leave of the court first had, hereby amend the bill of complaint in this cause by inserting therein on page 21 after the words "and that patent thereon was duly issued by the United States to Edward S. Carew, on July 30th, 1896, for lots 9 and 10, section 24, township 29, south range 18 east," the following paragraph:

Your complainants further allege that the said decision of the Secretary of the Interior awarding the right to enter the said
87 land as aforesaid was based upon erroneous conclusion of law and that said patent was issued illegally and in mistake of the law and in violation of the rights of your complainants.

FLEMING & FLEMING,
MUNFORD, HUNTON,
WILLIAMS & ANDERSON,
W. H. LAMAR,
GEORGE H. LAMAR,
Complainants' Solicitors.

We acknowledge service of notice to amend the bill as above set forth, Nov. 29th, 1901.

W. W. HAMPTON,
E. R. GUNBY,
Solicitors for Def'ts Except Finley.
S. Y. FINLEY,
In Pro. Per.

(Indorsed:) In the circuit court of the United States for the southern district of Florida. Sallie Field Scott *et al. vs.* Lizzie W. Carew *et al.* Amendment to bill. Filed Dec. 3rd, 1901. E. O. Locke, clerk.

Circuit Court of the United States, Southern District of Florida.

NOVEMBER 29TH, 1901.

Present: Honorable James W. Locke, district judge.

SALLIE FIELD SCOTT ET AL.
vs.
LIZZIE W. CAREW ET AL. } In Chancery.

The demurrer to the bill herein is argued by respective counsel, and is continued.

NOVEMBER 30TH, 1901.

The demurrer to the bill herein is argued by respective counsel, and continued.

DECEMBER 2ND, 1901.

The demurrer to the bill herein is argued by respective counsel, and continued.

DECEMBER 3RD, 1901.

The demurrer to the bill herein is argued by respective counsel, and submitted.

(Minute Book "E," pages 365 *et seq.*)

88 In the Circuit Court of the United States in and for the Southern District of Florida.

SALLIE FIELD SCOTT ET AL.
vs.
LIZZIE W. CAREW ET AL.

This cause coming on to be heard upon the demurrers to the bill of complaint herein, and having been fully heard and duly considered, it is ordered that said demurrers be and they are hereby sustained, and the bill of complaint dismissed.

JAMES W. LOCKE, *Judge.*

Jacksonville, Fla., February 7th, 1901.

(Indorsed:) United States circuit court, southern district of Florida. Sallie Field Scott *et al. vs.* Lizzie W. Carew *et al.* Order sustaining demurrer. Filed Feb'y 7th, 1902. E. O. Locke, clerk, by E. D. Dodge, deputy clerk.

In the Circuit Court of the United States in and for the Southern District of Florida.

SALLIE FIELD SCOTT ET AL.
vs.
LIZZIE W. CAREW ET AL.

The rights contended for in this case depend upon the provisions of the act of April 22nd, 1826, and the construction placed thereon. In substance this act provided that every person who did actually inhabit and cultivate a tract of land situate in the Territory of Florida, "which tract is not rightfully claimed by any other person," shall be entitled to the right of pre-emption in the purchase of the same.

The Hon. Secretary of the Interior, in substance, so construed this act as to find that the land in question was so held and occupied in

accordance with law at the time of its passage as to except it from the effect of the right of pre-emption, which would otherwise have attached.

The determination of the question raised upon this point depends upon what construction it put upon the language found in the act: "which tract is not rightfully claimed by any other person."

The bill shows that Robert J. Hackley, the ancestor of the complainants, had entered upon and was occupying the land in
89 question not under claim of right but simply as a settler, when Col. George M. Brooke in command of the U. S. troops entered upon and took possession of the same in February, 1824, and ousted the settler, and that such possession and occupation was continued and was continuing at the time of the passage of the act in question.

The Secretary of the Interior finds as a matter of fact that this land known as the Ft. Brooke military reservation was occupied under the direction of the Secretary of War, two years before the passage of the act upon which the claim of the Hackley heirs is predicated, and that court is bound by such findings of fact.

It is the contention of the complainants that the language used in the act should be held to apply only to the claim of some private individual claiming against the Government for his own interest.

This contention cannot be accepted, notwithstanding the earnest and able argument of counsel, which has been carefully examined and considered. The language of the act is sufficiently broad to cover any claim in force at the time of its passage rightfully made by any person in any capacity or in any character.

There is nothing to show either in its form or connection that it was to be limited to a private claim, or that it might not be intended to apply to a tract of land at that time rightfully claimed, occupied and used by an officer of the Government for the purposes and in the interest of the Government.

I therefore find that the construction placed upon the act of 1826 by the Honorable Secretary of the Interior is not so in violation of the principles of law as to demand a reversal, but that the land in question was rightfully claimed used, occupied and held by some person, in behalf of the United States at the time of the passage of the act of 1826, so as to prevent any attachment of a right to pre-emption claimed to have been granted by that act to the ancestor of the complainants, and the demurrer must be sustained, and as it appears that such conclusion reaches the whole equity of the complainants' case, which no amendment can change, the bill must be dismissed, and it will be so ordered.

JAMES W. LOCKE, *Judge.*

Jacksonville, Fla., February 7th, 1902.

(Indorsed:) United States circuit court, southern district of Florida. Sallie Field Scott, *et al. vs.* Lizzie W. Carew, *et al.* Opinion. Filed Feb. 7, 1902. E. O. Locke, clerk.

90 In the Circuit Court of the United States for the Southern District of Florida.

SALLIE FIELD SCOTT ET AL.
vs.
LIZZIE W. CAREW ET AL. } In Chancery.

And now, to wit, on this 1st day of March, 1902, come the complainants, by their solicitors, and say that in the record and proceedings in the above entitled cause there is manifest error, to-wit:

1st. The court erred in rendering its final decree in this case.

2nd. The court erred in its finding that the land in question was rightfully claimed, used, occupied, and held by some person in behalf of the United States, at the time of the act of 1826, (the same being an act entitled "An act giving the right of pre-emption, in the purchase of lands, to certain settlers in the States of Alabama, Mississippi, and Territory of Florida"), so as to prevent any attachment of a right to pre-emption claimed to have been granted by that act to the ancestor of the complainants.

3rd. The court erred in sustaining the demurrer of the defendants to the bill of complaint.

4th. The court erred in dismissing the bill of complaint.

WILLIAM H. LAMAR,
GEORGE H. LAMAR,
FLEMING & FLEMING,
MUNFORD, HUNTON,
WILLIAMS & ANDERSON,
Solicitors for Complainants.

(Indorsed:) In the circuit court of the United States, for the southern district of Florida. In chancery. Sallie Field Scott, *et al*, *vs.* Lizzie W. Carew, *et al*. Assignment of errors. Filed Mar. 1st, 1902. E. O. Locke, clerk.

91 In the Circuit Court of the United States for the Southern District of Florida.

SALLIE FIELD SCOTT, ELIZA MADISON SCOTT, Harriet B. Jones, Freeman Jones, Lucia Beverly Bernard, Hugh S. Morrison, Hackley and Elizabeth Madison Morrison, Infants, by Their Next Friend, Hugh S. Morrison; Maria Hackley, Mary and Sallie Hackley, Infants, by Their Next Friend, Mary Hackley; Mary F. Hackley, Sallie Strachan Hackley, Gertrude, Thomas H., and Stephen P. Hackley, Infants, by Their Next Friend, Mary F. Hackley, and Alexander S. Hackley	In Chancery.
vs	
LIZZIE W. CAREW, W. W. HAMPTON, E. R. GUNBY, M. G. Gibbons, M. M. Nelson, E. B. Beach, S. Y. Finley, and George W. Hall.	

And now on this 1st day of March, 1902, in open court, at the December term for 1901, come the above named complainants, who conceiving themselves to be aggrieved by the decree entered on the 7th day of February, 1902, in the above entitled cause, do hereby appeal from said decree to the United States circuit court of appeals for the fifth circuit. And they pray that their appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States court of appeals.

WILLIAM H. LAMAR,
GEORGE H. LAMAR,
FLEMING & FLEMING,
MUNFORD, HUNTON,
WILLIAMS & ANDERSON,
Solicitors for Complainants.

And now, to-wit, on this first day of March, 1902, it is ordered that the appeal as above prayed for be allowed, and that the complainants, or one of them, shall give a bond with good and sufficient security, in the sum of two hundred and fifty dollars, that the complainants shall prosecute their appeal to effect, and answer all damages and costs, if they fail to make their plea good.

JAMES W. LOCKE, *Judge.*

Jacksonville, Fla., March 1st, 1902.

92 (Indorsed:) In the circuit court of the United States, for the southern district of Florida. In chancery. Sallie Field Scott, *et al.*, *vs.* Lizzie W. Carew, *et al.* Appeal and allowance. Filed Mar. 1, 1902. E. L. Locke, clerk.

Know all men by these presents, that we Hugh S. Morrison, as principal, and the United States Fidelity — Guaranty Company as surety, are held and firmly bound unto Lizzie W. Carew, W. W. Hampton, E. R. Gunby, M. G. Gibbons, M. M. Nelson, E. C. Beach, S. Y. Finley and George W. Hall, in the full and just sum of two hundred and fifty dollars, to be paid to the said Lizzie W. Carew, W. W. Hampton, E. R. Gunby, M. G. Gibbons, M. M. Nelson, E. C. Beach, S. Y. Finley and George W. Hall, their certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 29th day of March, in the year of our Lord, one thousand nine hundred and two.

Whereas, lately at a term of the circuit court of the United States for the southern district of Florida, in a suit depending in said court, between Sallie Field Scott, Eliza Madison Scott, Harriet B. Jones, Freeman Jones, Lucia Beverly Bernard, Hugh S. Morrison, Hackley Morrison, Elizabeth Madison Morrison, Maria Hackley, Sallie Hackley, Mary F. Hackley, Sallie Stranchan Hackley, Alexander S. Hackley, Gertrude Hackley, Thomas H. Hackley and Stephen P. Hackley, complainants, and Lizzie W. Carew, W. W. Hampton, E. R. Gunby, M. G. Gibbons, M. M. Nelson, E. C. Beach, S. Y. Finley and George W. Hall, defendants, a decree was rendered against the said Sallie Field Scott, Eliza Madison Scott, Harriet B. Jones, Freeman Jones, Lucia Beverly Bernard, Hugh S. Morrison, Hackley Morrison, Elizabeth Madison Morrison, Maria Hackley, Mary Hackley, Sallie Hackley, Mary F. Hackley, Sallie Strachan Hackley, Alexander S. Hackley, Gertrude Hackley, Thomas H. Hackley and Stephen P. Hackley, and the said last named parties having, in open court, at the same term of said court, obtained an appeal to reverse the decree in the aforesaid suit to a United States circuit court of appeals, for the fifth circuit, to be holden at New Orleans.

Now the condition of the above obligation is such, that if the said Sallie Field Scott, Eliza Madison Scott, Harriet B. Jones, Freeman Jones, Lucia Beverly Bernard, Hugh S. Morrison, Hackley
93 Morrison, Elizabeth Madison Morrison, Maria Hackley, Sallie Hackley, Mary F. Hackley, Sallie Strachan Hackley, Alexander S. Hackley, Gertrude Hackley, Thomas F. Hackley and Stephen P. Hackley shall prosecute their appeals to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

HUGH S. MORRISON, [SEAL.]
UNITED STATES FIDELITY & GUARANTY CO.,
By F. P. FLEMING,
A. W. BARRS,
[CORPORATE SEAL.] *Att'ys in Fact.*

Sealed and delivered in presence of
HENRY W. ANDERSON.

11—52

Approved this 31st day of March, 1902.

JAMES W. LOCKE, *Judge.*

(Indorsed:) In the circuit court of the United States for the southern district of Florida. Sallie Field Scott, *et als.*, *vs.* Lizzie W. Carew *et als.* Appeal bond. Filed Mar. 31, 1902. E. O. Locke, clerk.

In the Circuit Court of the United States for the Southern District of Florida.

SALLIE FIELD SCOTT ET AL.
vs.
LIZZIE W. CAREW ET AL. } In Chancery.

The complainants in this cause having entered their *appear* (appearance) from the final decree of this court to the United States circuit court of appeals for the fifth circuit, and the said complainants, or one of them, in order to perfect said appeal, being required to give bond with a good and sufficient security in the sum of two hundred and fifty dollars, conditioned to prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, and such bond having been presented to this court, the same is hereby approved and accepted, and the said appeal is hereby allowed.

Done in open court this 31st day of March, A. D. 1902.

JAMES W. LOCKE, *Judge.*

(Indorsed:) In the circuit court of the United States, for the southern district of Florida. In chancery. Sallie Field
94 Scott, *et al.*, *vs.* Lizzie W. Carew, *et al.* Approval of bond and allowance of appeal. Filed Mar. 31, 1902. E. O. Locke, clerk.

In the Circuit Court of the United States, Fifth Circuit, Southern District of Florida.

SALLIE FIELD SCOTT ET ALS.
vs.
LIZZIE W. CAREW ET ALS.

I, Eugene O. Locke, clerk of the circuit court of the United States for the southern district of Florida, hereby certify that the foregoing typewritten pages, and part pages, numbered from one to one hundred and thirty-two, inclusive, are a true copy of the record, assignments of errors, and all proceedings in the above entitled cause had in said court, as appears from the records and files in my office.

In testimony whereof I hereunto set my hand officially, and affix

the seal of said court, at Jacksonville, in said district, this twelfth day of April, A. D. 1902.

[SEAL.] EUGENE O. LOCKE, *Clerk.*

95 United States Circuit Court of Appeals, Fifth Circuit.

November Term, 1902, Jan. 21, 1903.

(Extract from minutes.)

SALLIE F. SCOTT ET AL.
vs.
LIZZIE W. CAREW ET AL. } No. 1160.

On this day this cause was regularly called, and after argument by Henry W. Anderson, Esq., for appellants, and Horatio Bisbee, Esq., and Wm. Wade Hampton, Esq., for appellees, the further hearing was continued until Monday, January 26, 1903.

November Term, 1902, Jan. 26, 1903.

(Extract from minutes.)

SALLIE F. SCOTT ET AL.
vs.
LIZZIE W. CAREW ET AL. } No. 1160.

On this day this cause came on further to be heard, and after argument by Wm. Wade Hampton, Esq., and E. R. Gunby, Esq., for appellees, and Francis P. Fleming, Esq., for appellants, was submitted to the court upon record and briefs.

96 November Term, 1902, March 24, 1903.

(Extract from minutes.)

SALLIE FIELD SCOTT ET AL.
vs.
LIZZIE W. CAREW ET AL. } No. 1160.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Florida, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby affirmed.

It is further ordered, adjudged and decreed that the appellants, Sallie Field Scott, Eliza Madison Scott, Harriet B. Jones, Freeman Jones, Lucia Beverly Barnard, Hugh S. Morrison, Hackley and Elizabeth Madison Morrison, infants, by their next friend, Hugh S. Morrison, Maria Hackley, Mary and Sallie Hackley, infants, by their next friend, Mary Hackley, Mary F. Hackley, Sallie Strachan Hackley, Gertrude, Thomas H. and Stephen P. Hackley, infants, by their next friend, Mary F. Hackley and Alexander S. Hackley, and the surety on the appeal bond herein, United States Fidelity & Guaranty Co., be condemned to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

March 24, 1903.

97 Original filed March 24, 1903.

CHARLES H. LEDNUM, *Clerk.*

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1902.

SALLIE FIELD SCOTT ET ALS., Appellants,
v.
LIZZIE W. CAREW ET ALS., Appellees. } No. 1160.

Appeal from the United States circuit court, southern district of Florida.

Before Pardee, McCormick, and Shelby, circuit judges.

By the COURT: After a careful examination and consideration of the elaborate decisions of Mr. Secretary Noble, Mr. Secretary Smith, Mr. Secretary Bliss and Judge Locke, all found in the transcript and all adverse to the claims of the appellants, and a study of the very able briefs filed by eminent counsel, we are of opinion that the judge of the circuit court properly ruled in sustaining the demurrer to the complainant's bill, and therefore the judgment appealed from is affirmed.

98 In the United States Circuit Court of Appeals for the Fifth Circuit.

SALLIE FIELD SCOTT, ELIZA MADISON SCOTT, HARRIET B. JONES, Freeman Jones, Lucia Beverly Bernard, Hugh S. Morrison, Hackley Morrison, Elizabeth Madison Morrison, Maria Hackley, Mary Hackley, Sallie Hackley, Mary F. Hackley, Sallie Strachan Hackley, Alexander S. Hackley, Gertrude Hackley, Thomas H. Hackley, and Stephen P. Hackley, Complainants and Appellants,

versus

LIZZIE W. CAREW, W. W. HAMPTON, E. R. GUNBY, M. G. GIBBONS, M. M. Nelson, E. C. Beach, S. Y. Finley, and George W. Hall, Defendants and Appellees.

Assignment of Errors.

Now come the above named complainants and appellants, Sallie Field Scott, Eliza Madison Scott, Harriett B. Jones, Freeman Jones, Lucia Beverly Bernard; Hugh S. Morrison; Hackley Morrison; Elizabeth Madison Morrison; Maria Hackley; Mary Hackley; Sallie Hackley; Mary F. Hackley; Sallie Strachan Hackley; Alexander S. Hackley; Gertrude Hackley; Thomas H. Hackley and Stephen P. Hackley, and make and file the following assignment of errors upon which they will rely in their appeal from the decree of the court above named, made and entered herein on the 24th day of March, 1903, as follows, to wit:

99 I.

The court erred in affirming the decree of the circuit court made and entered in this cause on the 7th day of February, 1902.

II.

The court erred in not making and entering a decree in favor of complainants and appellants against the defendants and appellees, and in not requiring the defendants and appellees to convey to the complainants and appellants the land described in the bill of complaint in this cause, as amended, and to account to the complainants and appellants in accordance with the prayers of said bill as amended.

III.

The court erred in not making and entering a decree that the complainants and appellants were the equitable owners of the property described in the bill of complaint as amended, and entitled to a conveyance of the legal title thereto.

IV.

The court erred in holding that the land described in the bill of complaint as amended was rightfully claimed, used and occupied and held by some other person in behalf of the United States at the time of the act of 1826 (the same being entitled "An act giving the right of pre-emption in the purchase of lands to certain settlers in the States of Alabama, Mississippi, and Territory of Florida") so as to prevent the attachment of a right of pre-emption claimed in said bill of complaint as amended to have been granted by said act to Robert J. Hackley, the ancestor of the complainants and appellees.

100 V.

The court erred in sustaining the demurrer of the defendants and appellees to the bill of complaint as amended, of the complainants and appellants.

VI.

The court erred in holding and adjudging that the defendants and appellees were entitled to recover costs herein and said decree is erroneous in adjudging and decreeing that the defendants and appellees should recover of the complainants and appellants costs of this cause in said court, and that an execution might be issued out of the said circuit court therefor.

VII.

The court erred in dismissing the bill of complaint of the complainants and appellants and the decree is erroneous in so ordering and adjudging.

Wherefore, the complainants and appellants pray that the said decree of the United States circuit court of appeals for the fifth circuit, be reversed, with directions to render and enter a decree in favor of the complainants and appellants and against the defendants and appellees, in accordance with the prayers of this appeal and the prayers of the bill of complaint in this cause as amended.

FRANCIS P. FLEMING,
FRANCIS P. FLEMING, JR.,
BEVERLY B. MUNFORD,
EPPA HUNTON, JR.,
E. RANDOLPH WILLIAMS,
HENRY W. ANDERSON,
WILLIAM H. LAMAR,
GEORGE H. LAMAR,
Solicitors for Complainants and Appellants, Sallie Field Scott et als.

101 The foregoing has the following endorsements, to-wit: No. 1160. In the United States circuit court of appeals for the fifth circuit. Sallie Field Scott *et als.*, complainants & appellees, *vs.* Lizzie W. Carew, *et als.*, defendants & appellees. Assignment of errors. Filed 14 day of May, 1903, Charles H. Lednum, clerk of the United States circuit court of appeals.

102 In the United States Circuit Court of Appeals for the Fifth Circuit.

SALLIE FIELD SCOTT, ELIZA MADISON SCOTT, Harriett B. Jones, Freeman Jones, Lucia Beverly Bernard, Hugh S. Morrison, Hackley Morrison, Elizabeth Madison Morrison, Maria Hackley, Mary Hackley, Sallie Hackley, Mary F. Hackley, Sallie Strachan Hackley, Alexander S. Hackley, Gertrude Hackley, Thomas H. Hackley, and Stephen P. Hackley	In Chancery.
versus	
LIZZIE W. CAREW, W. W. HAMPTON, E. R. GUNBY, M. G. Gibbons, M. M. Nelson, E. C. Beach, S. Y. Finley, and George W. Hall.	

Petition for Appeal.

Now come Sallie Field Scott; Eliza Madison Scott; Harriett B. Jones, Freeman Jones; Lucia Beverly Bernard; Hugh S. Morrison; Hackley Morrison; Elizabeth Madison Morrison; Maria Hackley; Mary Hackley; Sallie Hackley; Mary F. Hackley; Sallie Strachan Hackley; Alexander S. Hackley; Gertrude Hackley; Thomas H. Hackley and Stephen P. Hackley, complainants and appellants in the above entitled cause, and conceiving themselves aggrieved by the decree made and entered by the United States circuit court of appeals for the fifth circuit in the above entitled cause on the 24th day of March, 1903, affirming the decree of the circuit court made and entered in said cause on the 7th day of February, 1902, do hereby appeal from said decree of the said United States circuit court of appeals for the fifth circuit, to the Supreme Court of the United States, and these appellants pray that said appeal may be allowed and that a transcript of the record and proceedings herein and upon which said de-
103 cree was made and entered, duly authenticated may be transmitted to the United States Supreme Court.

FRANCIS P. FLEMING,
FRANCIS P. FLEMING, JR.,
BEVERLY B. MUNFORD,
EPPA HUNTON, JR.,
E. RANDOLPH WILLIAMS,
HENRY W. ANDERSON,
WILLIAM H. LAMAR,
GEORGE H. LAMAR,
Solicitors for Complainants and Appellants, Sallie Field Scott et als.

Dated May 9, 1903.

And now, to wit, on this 11th day of May, 1903, it is ordered that the above appeal in the above entitled cause be and it is hereby allowed as prayed.

EDWARD D. WHITE,
Associate Justice U. S. Supreme Court.

Dated May 11th, 1903.

The foregoing has the following endorsements, to wit: No. 1160. In the United States circuit court of appeals, for the fifth circuit. Sallie Field Scott *et als.*, complainants & appellants, *vs.* Lizzie W. Carew, *et als.*, defendants &. appellees. Appeal and allowance. Filed 14 day of May, 1903, Charles H. Lednum, clerk of the United States circuit court of appeals.

104 In the United States Circuit Court of Appeals for the Fifth Circuit.

SALLIE FIELD SCOTT, ELIZA MADISON SCOTT, HARRIETT B. JONES, Freeman Jones, Lucia Beverly Bernard, Hugh S. Morrison, Hackley Morrison, Elizabeth Madison Morrison, Maria Hackley, Mary Hackley, Sallie Hackley, Mary F. Hackley, Sallie Strachan Hackley, Alexander S. Hackley, Gertrude Hackley, Thomas H. Hackley, and Stephen P. Hackley, Complainants and Appellants,

versus

LIZZIE W. CAREW, W. W. HAMPTON, E. R. GUNBY, M. G. GIBBONS, M. M. Nelson, E. C. Beach, S. Y. Finley, and George W. Hall, Defendants and Appellees.

Order Fixing Amount of Appeal Bond.

The complainants and appellants in the above entitled cause, having this day filed their petition for appeal from the decree made and entered herein on the 24th day of March, 1903, to the Supreme Court of the United States, together with an assignment of errors in due form, and said petition and appeal having this day been allowed,

Now, therefore, it is ordered that the appeal bond herein be and it is hereby fixed at the sum of five hundred dollars, conditioned to the effect that the said complainants and appellants shall prosecute their said appeal to effect, and shall answer all damages and costs that may be awarded against them if they shall fail to make
105 their plea and appeal good. Said bond having been by me approved.

EDWARD D. WHITE,
Associate Justice Supreme Court of the United States.

The foregoing has the following endorsements, to-wit: No. 1160. In the United States circuit court of appeals for the fifth circuit. Sallie Field Scott, *et als.*, complainants & appellants, *vs.* Lizzie W. Carew, *et als.*, defendants and appellees. Order fixing amount of appeal bond. Filed 14 day of May, 1903. Charles H. Lednum, clerk of the United States circuit court of appeals.

106 Know all men by these presents, that we, Hugh S. Morrison, as principal, and United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto Lizzie W. Carew, W. W. Hampton, E. R. Gunby, M. G. Gibbons, M. M. Nelson, E. C. Beach, S. Y. Finley and George W. Hall, in the full and just sum of five hundred dollars, to be paid to the said Lizzie W. Carew, W. W. Hampton, E. R. Gunby, M. G. Gibbons, M. M. Nelson, E. C. Beach, S. Y. Finley, and George W. Hall, their certain attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 6th day of May, in the year of our Lord, 1903.

Whereas, lately at a term of the United States circuit court of appeals for the fifth district, in a suit pending in said court between Sallie Field Scott, Eliza Madison Scott, Harriett B. Jones, Freeman Jones, Lucia Beverly Bernard, Hugh S. Morrison, Hackley Morrison, Elizabeth Madison Morrison, Mary Hackley, Sallie Hackley, Mary F. Hackley, Sallie Strachan Hackley, Alexander S. Hackley, Gertrude Hackley, Thomas H. Hackley and Stephen B. Hackley, complainants and appellants; and Lizzie W. Carew, W. W. Hampton, E. R. Gunby, M. G. Gibbons, M. M. Nelson, E. C. Beach, S. Y. Finley and George W. Hall, defendants and appellees, a decree was rendered against the said Sallie Field Scott, Eliza Madison Scott, Harriett B. Jones, Freeman Jones, Lucia Beverly Bernard, Hugh S. Morrison, Hackley Morrison, Elizabeth Madison Morrison, Mary Hackley, Sallie Hackley, Mary F. Hackley, Sallie Strachan Hackley, Alexander S. Hackley, Gertrude Hackley, Thomas H. Hackley and Stephen B. Hackley; and the said last named parties
107 having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said Lizzie W. Carew, W. W. Hampton, E. R. Gunby, M. G. Gibbons, M. M. Nelson, E. C. Beach, S. Y. Finley and George W. Hall, citing them and admonishing them to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date thereof.

Now the condition of the above obligation is such that if the said Sallie Field Scott, Eliza Madison Scott, Harriett B. Jones, Freeman Jones, Lucia Beverly Bernard, Hugh S. Morrison, Hackley Morrison, Elizabeth Madison Morrison, Mary Hackley, Sallie Hackley, Mary F. Hackley, Sallie Strachan Hackley, Alexander S. Hackley, Gertrude Hackley, Thomas H. Hackley and Stephen B Hackley,

shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

HUGH S. MORRISON. [SEAL.]
[SEAL.] THE UNITED STATES FIDELITY & GUARANTY CO.,
By EDW. J. PENNIMAN, *2nd Vice-President.*

Attest: H. V. D. JOHNS,
2nd Ass't Secretary.

Sealed and delivered in presence of:
H. W. ANDERSON.

Approved by
EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

108 STATE OF MARYLAND, *City of Baltimore,* } *ss:*

On this — day of —— 1903; before me appears Edw. J. Penniman, 2nd vice president of the United States Fidelity and Guaranty Company, of Baltimore City, Maryland, with whom I am personally acquainted, who being by me duly sworn, says that he is 2nd vice president of the United States Fidelity and Guaranty Company; that he knows the corporate seal of the company; that the seal affixed to the foregoing instrument is such corporate seal; that it was affixed by the order of the board of directors of said company; that he signed said instrument as 2nd vice president of said company by like authority. The said Edw. J. Penniman further says that he is acquainted with H. V. D. Johns and knows him to be the 2nd ass't secretary of the said The United States Fidelity and Guaranty Company; that the signature of the said H. V. D. Johns subscribed to the said instrument is the genuine handwriting of the said H. V. D. Johns and was thereto subscribed by like order of the said board of directors.

My commission expires first Monday in May 1904.

A. D. PATRICK,
[SEAL.] *Notary Public.*

The foregoing has the following endorsements, to-wit: No. 1160. In the United States circuit court of appeals fifth district. Sallie Field Scott & others *vs.* Lizzie W. Carew & others. Appeal bond. Filed 14 day of May, 1903. Charles H. Lednum, clerk of the United States circuit court of appeals.

109 United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 109 pages, numbered from A to 108, inclusive, contain a true copy of the record, assignment of errors and all proceedings in the case, including the opinion of the court, in the case of Sallie Field Scott *et al.*, appellants, *versus* Lizzie W. Carew, *et al.*, appellees, No. 1160, as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans Louisiana, this 21st day of May, 1903.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

110 UNITED STATES OF AMERICA, *ss:*

To Lizzie W. Carew, W. W. Hampton, E. R. Gunby, M. G. Gibbons, M. M. Nelson, E. C. Beach, S. Y. Finley, and George W. Hall, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal, filed in the clerk's office of the United States circuit court of appeals, for the fifth circuit, wherein Sallie Field Scott, Eliza Madison Scott, Harriett B. Jones, Freeman Jones, Lucia Beverly Bernard, Hugh S. Morrison, Hackley Morrison, Elizabeth Madison Morrison, Mary Hackley, Sallie Hackley, Mary F. Hackley, Sallie Strachan Hackley, Alexander S. Hackley, Gertrude Hackley, Thomas H. Hackley, and Stephen P. Hackley, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglas White, associate justice of the Supreme Court of the United States, this eleventh day of May, in the year of our Lord one thousand nine hundred and three.

EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

111 [Endorsed:] No. 1160 Original Mar. doc. 201 Sallie Field Scott *et al. v.* Lizzie W. Carew *et al.* Citation to appellees. U. S. circuit court of appeals Filed Jun- 4 1903 Charles H. Lednum clerk.

On this 25th day of May, in the year of our Lord one thousand nine hundred and three, personally appeared John R. Williams before me, the subscriber, as deputy United States marshal in and for the southern district of Florida, at Tampa, Florida, and makes oath that he delivered a true copy of the within citation to E. R. Gunby, William Hunter and M. G. Gibbons, Esqs., residing at Tampa, Florida, in the southern district of Florida.

JOHN F. HORR,
U. S. Marshal,
By JOHN R. WILLIAMS,
Dept. Marshal.

Sworn to and subscribed the 25 day of May, A. D. 1903.

[Seal of U. S. Circuit Court, South. Dist. Florida.]

E. O. LOCKE, *Clerk,*
By H. E. CRANE,
Deputy Clerk.

Served
H. BISBEE.

112 On this 29th day of May in the year of our Lord one thousand nine hundred and three personally appeared Hampton S. Chambers before me, the subscriber as deputy United States marshal in and for the southern district of Florida at Ocala Florida, and makes oath that he delivered a true copy of the within citation to William Wade Hampton on May the 28 A. D. 1903 residing at Gainesville Florida in the southern district of Florida

JOHN F. HORR, *U. S. Marshal,*
By HAMPTON S. CHAMBERS,
Dept. Marshal.

Sworn to and subscribed the 29th day of May A. D. 1903.

{ Seal of D. S. Williams, U. S. Commissioner, }
{ Southern District of Florida. }

DAVID S. WILLIAMS.
United States Commissioner, Southern District of Florida.

113 On this 2nd day of June, in the year of our Lord one thousand nine hundred and three, personally appeared before the clerk of the United States circuit court for the southern district of Florida, John R. Williams, a deputy United States marshal in and for the southern district of Florida at Tampa, Florida, and makes oath that on May 25th, 1903 at Tampa, Florida, he delivered a true copy of the within citation to E. R. Gunby, William Hunter, and M. G. Gibbons, Esqs., residing at Tampa, Florida, in the southern district of Florida, who are attorneys and solicitors of record for the within named Lizzie W. Carew, W. W. Hampton, E. R. Gunby,

M. G. Gibbons, M. M. Nelson, E. C. Beach, S. Y. Finley, and George W. Hall appellees in the within named cause, in the United States circuit court of appeals for the fifth circuit.

JOHN R. WILLIAMS,
U. S. Deputy Marshal.

Sworn to and subscribed the 2nd day of June, A. D. 1903.

[Seal of U. S. Circuit Court, South. Dist. Florida.]

E. D. DODGE,
Deputy Clerk U. S. Circuit Court.

114 On the 2nd day of June, in the year of our Lord one thousand nine hundred and three, personally appeared before me clerk of the United States circuit court for the southern district of Florida, Percy C. Stickney a deputy United States marshal in and for the southern district of Florida, and makes oath that on May 22nd, 1903, at Jacksonville, Florida, he delivered a true copy of the within citation to Horatio Bisbee, Esq., residing at Jacksonville, Florida, in the southern district of Florida, who is an attorney and solicitor of record for the within named Lizzie W. Carew, W. W. Hampton, E. R. Gunby, M. G. Gibbons, M. M. Nelson, E. C. Beach, S. Y. Finley, and George W. Hall appellees in the within named cause, in the United States circuit court, of appeals for the fifth circuit.

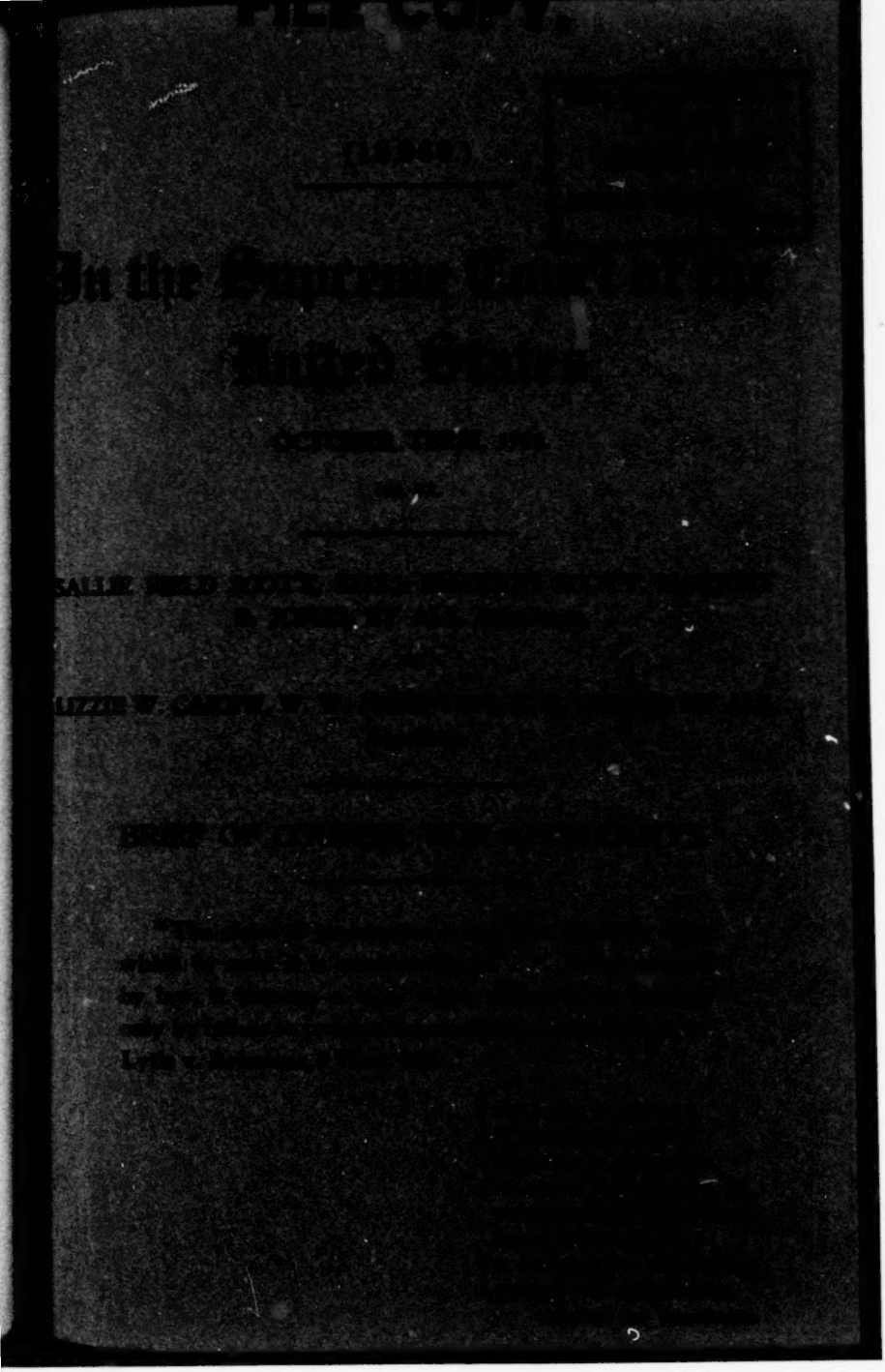
PERCY C. STICKNEY,
Deputy U. S. Marshal.

Sworn to and subscribed the 2nd day of June, A. D. 1903.

[Seal of U. S. Circuit Court, South. Dist. Florida.]

E. D. DODGE,
Deputy Clerk U. S. Circuit Court.

Endorsed on cover: File No. 18,966. U. S. circuit court of appeals, 5th circuit. Term No. 52. Sallie Field Scott, Eliza Madison Scott, Harriett B. Jones, *et al.*, appellants, *vs.* Lizzie W. Carew, W. W. Hampton, E. R. Gunby, *et al.* Filed June 6, 1903. File No. 18,966.



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18,966.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 52.

SALLIE FIELD SCOTT; ELIZA MADISON SCOTT; HARRIET B. JONES; FREEMAN JONES; LUCIA BEVERLY BERNARD; HUGH S. MORRISON; HACKLEY MORRISON; ELIZABETH MADISON MORRISON; MARIA HACKLEY; MARY HACKLEY; SALLIE HACKLEY; MARY F. HACKLEY; SALLIE STRACHAN HACKLEY; ALEXANDER S. HACKLEY; GERTRUDE HACKLEY; THOMAS H. HACKLEY, AND STEPHEN P. HACKLEY,

vs.

LIZZIE W. CAREW; W. W. HAMPTON; E. R. GUNBY; M. G. GIBBONS; M. M. NELSON; E. C. BEACH; S. Y. FINLEY, AND GEORGE W. HALL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF COUNSEL FOR APPELLANTS.

This case stands upon appeal from a decree entered in the United States Circuit Court of App als for the Fifth Circuit, March 24, 1903 (R. Star, p. 96), affirming, with costs, the decree of the Circuit Court of the United States for the Southern District of Florida, entered February 7, 1902 (R. Star, p. 88), sustaining demurrers and dismissing the bill of complaint.

In order to avoid repetition, we will state here that the references in this brief to pages are to pages of the record from the court below which constitutes the star pages in the record as printed in this court, unless otherwise stated.

The cause was heard in the Circuit Court upon the bill, and

exhibits filed therewith and demurrers thereto filed by the defendants, the appellees in this court.

The appellants claim that, as heirs-at-law of one Robert J. Hackley, deceased, a pre-emption claimant under the act of April 22, 1826 (4 Stats., 154), they are the equitable owners of a certain tract of land in Hillsborough county, Florida, which was formerly a part of the Fort Brooke Military Reservation.

The appellees claim said land under a patent issued by the United States.

The purpose of this suit is to have the defendants decreed to hold "the legal title of said land in trust for the complainants," and to be required to "convey said land to the complainants"; also, to require defendants to account to the complainants for the proceeds of any of the lands which may have been sold, said account to be "upon such terms and conditions as may be agreeable to equity."

STATEMENT OF THE CASE.

The claim of the complaints is based upon the Act of Congress of April 22, 1826 (4 Stats., 154). The first section of that act reads as follows:

> "That every person, or the legal representatives of any person, who, being either the head of a family, or twenty-one years of age, did, on or before the first day of January, in the year one thousand eight hundred and twenty-five, actually inhabit and cultivate a tract of land situated in the Territory of Florida, which tract is not rightfully claimed by any other person, and who shall not have removed from the said Territory, shall be entitled to the right of pre-emption in the purchase thereof, under the same terms, restrictions, conditions, provisions, and regulations, in every respect, as are directed by the act, entitled 'An act giving the right of pre-emption, in the purchase of lands, to certain settlers in the Illinois Territory,' passed February the fifth, one thousand eight hundred and thirteen; *Provided*, That no person shall be entitled to the provisions of this section who claims any tract of land in said Territory by virtue of a confirmation of the commissioners, or by virtue of any act of Congress."

The Act of February 5, 1813 (2nd Stats., 797), "whose terms, restrictions, conditions, provisions and regulations in every respect" are made a part of said Act of 1826, reads as follows:

"That every person, or legal representative of every person, who has actually inhabited and cultivated a tract of land lying in either of the districts established for the sale of public lands, in the Illinois Territory, which tract is not rightfully claimed by any other person, and who shall not have removed from said Territory; every such person and his legal representatives shall be entitled to a preference in becoming the purchaser from the United States of such tract of land at private sale, at the same price, and on the same terms and conditions in every respect as are, or may be provided by law, for the sale of other lands sold at private sale in said Territory, at the time of making such purchase; *Provided,* That no more than one-quarter section of land shall be sold to any one individual, in virtue of this act; and the same shall be bounded by the sectional and divisional lines *run, or to be run,* under the direction of the Surveyor-General for the division of the public lands; *Provided also,* That no lands reserved from sale by former acts, or lands which have been directed to be sold in town lots, and out lots, shall be sold under this act. (Italics ours.)

"SEC. 2. *And be it further enacted,* That every person claiming a preference in becoming the purchaser of a tract of land, in virtue of this act, shall make known his claim by delivering a notice in writing to the Register of the Land Office, for the district in which the land may lie, wherein he shall particularly designate the quarter section he claims; which notice the Register shall file in his office, on receiving twenty-five cents from the person delivering the same. And in every case where it shall appear to the satisfaction of the Register and Receiver of Public Moneys of the Land Office, that any person, who has delivered his notice of claim, is entitled, according to the provisions of this act, to a preference in becoming the purchaser of a quarter section of land, such person so entitled shall have a right to enter the same with the Register of the Land Office, on producing his receipt from the Receiver of Public Moneys for at least one-twentieth part of the purchase-money, as in case of other public lands sold at private sale; *Provided,* That all lands to be sold under this act shall be entered with the Register, at least two weeks before the time of the commencement of the public sales, in the district wherein the land lies: and

every person having a right of preference in becoming the purchaser of a tract of land, who shall fail so to make his entry with the Register, within the time prescribed, his right shall be forfeited, and the land by him claimed shall be offered at public sale, with the other public lands in the district to which it belongs."

The bill alleges, in substance (Record, p. 5, *et seq.*), that Robert J. Hackley, the ancestor of complainants, who was over twenty-one years of age and the head of a family, in November, 1823, settled upon, inhabited and cultivated the land in controversy, and erected a substantial dwelling-house thereon. That the land was not rightfully claimed by any other person at the time of the passage of the Act of 1826 or before; that Hackley never claimed any other land in Florida by virtue of confirmation by commissioners under act of Congress, and that he continued to reside in Florida until his death, in 1845; that in February, 1824, a detachment of United States troops, under Colonel Brooke, in connection with the Indian troubles, took possession of the house and land occupied by Hackley and settled a camp or cantonment thereon; that troops continued to occupy the same until December 10, 1830, when, "by executive order of the President of the United States," the Fort Brooke Military Reservation was established, containing sixteen square miles of land, embracing the above-mentioned tract of land, which had been settled and occupied in 1823 and 1824 as aforesaid. That the said military reservation was thereafter from time to time reduced by executive order, until on June 1, 1873, it embraced but 148.11 acres, being the land described in the bill, known as the "Reduced Fort Brooke Military Reservation," which reservation was relinquished and transferred by the Secretary of War to the Interior Department on January 4, 1883. That the Land Office in St. Augustine, in which jurisdiction the land in controversy was located, was first established by executive order in 1828.

That in 1835, the said land not then having been surveyed, Hackley filed with the Register of said Land Office evidence designating the tract claimed and proof of his settlement, and asserted his claim of pre-emption in the purchase thereof.

That after the changing of the boundaries of the land districts in Florida, so that the said land became in the jurisdiction of

On page 5, line 30, after words "Robert J. Hackley," insert the following:

"The proceedings before the Commissioner of the General Land Office on appeal, which resulted in a decision on December 10, 1890, in favor of the complainants, the heirs of Robert J. Hackley."

the Land Office at Newmansville, Hackley again, in 1843, filed his proofs and renewed his said pre-emption claim in said Land Office, and that he continued to assert his right until his death, in 1845, since which time it has been prosecuted by his heirs. That on March 6, 1883, the General Land Office prepared and submitted to the local Land Office at Gainesville an approved diagram of the official survey of the said reduced Fort Brooke Military Reservation into seven lots, containing in all 148.11 acres, which was received in said office at Gainesville on March 22, 1883; that on April 2, 1883, the Commissioner of the General Land Office suspended said diagram and directed the Register and Receiver to allow no entries upon any of the lands within said reservation, which suspension continued until final adjudication by the Secretary of the Interior.

That on September 26, 1887, T. H. Randolph, as administrator of the estate of R. J. Hackley, and on behalf of the legal representatives of said Hackley, filed in the Land Office at Gainesville a supplemental notice, or declaratory statement, of their claim to right of pre-emption in the purchase of said land, describing the same by the government surveys. That on October 14, 1887, said Randolph, in said capacity, renewed his said application for the right of pre-emption in the purchase of said land, and tendered the purchase-price thereof, which application was rejected by the Register, and the money tendered refused by the Receiver, holding that the land was not subject to entry. The land was never offered for sale.

The bill further shows the proceedings before the Register and Receiver of the local Land Office at Gainesville, Fla., which resulted in a decision, on December 10, 1890, in favor of the complainants, the heirs of Robert J. Hackley; the proceedings before the Secretary of the Interior, on appeal, which resulted in a decision, in 1892, in which the Secretary adopted the finding of facts made by the Register and Receiver and the Commissioner, but upon conclusions of law decided against the heirs of Hackley and all other claimants; the proceedings on review before the Secretary of the Interior, which resulted in a decision, on July 24, 1894, in which the Secretary of the Interior again approved the finding of facts, but upon conclusions of law decided against

the heirs of Robert J. Hackley, and awarded the lands in controversy to certain of the other claimants.

The bill further alleges that in 1896 a patent was issued, in accordance with the decision of the Department, to E. S. Carew for Lots 9 and 10, Sec. 24, T. 29, S. R. 18 E., containing 59.93 acres; all being a part of the land claimed by virtue of the original settlement of said Robert J. Hackley, and the provisions of the act of April 22, 1826. The remainder of said 148.11 acres was patented to other parties, but is not involved in this case. That in 1898 one Belbie and others filed a petition before the Interior Department, asking that suit be instituted to set aside said patents for fraud in the procurement thereof, which resulted in a decision of March 8, 1898 (R., 66), in which the Secretary refused to request the institution of said proceedings.

That Lizzie W. Carew, widow of, heir-at-law and sole beneficiary of the above patentee, has made conveyances to certain other parties, who are also made defendants to the bill, undertaking to convey certain portions of said lots to those defendants, and the bill alleges that said conveyances were without legal, valuable or real consideration, and that the grantees took with full notice of the rights of the complainants.

The bill then alleges that the complainants are the equitable owners of said land, and pray that the defendants may be decreed to hold the legal title in trust for the complainants, and may be required to convey the same; and that the defendants may also be required to account to the complainants for the proceeds of any part of said lands which may have been sold.

Copies of the following records were filed with the bill as exhibits and made a part thereof:

Exhibits A, B, C, D and DD, being affidavits of the settlement and improvement of the land in question by Hackley. Pages 21 to 24, inclusive.

Exhibits E and F, being the application of T. H. Randolph, administrator, to purchase said lands, with the endorsements of the Register and Receiver thereon, as heinbefore stated. Pages 25 to 26.

Exhibit G, being the decision of the Commissioner of the General Land Office, rendered December 10, 1890, containing the

finding of facts, and deciding in favor of the Hackley heirs. Pages 26 to 35, inclusive.

Exhibit H, being the decision of Secretary Noble, dated November 25, 1892. Pages 36 to 50, inclusive.

Exhibit J, being the decision of Secretary Smith, dated July 24, 1894. Pages 51 to 65, inclusive.

Exhibit K, being the decision of Secretary Bliss, dated March 8, 1898. Pages 66 to 74, inclusive.

To this bill, and the exhibits therewith, the defendants, other than S. Y. Finley, filed their joint and several demurrer, specifying fourteen grounds of demurrer, which will be found set out at length at pages 79 to 82; and S. Y. Finley filed his demurrer, specifying eight grounds of demurrer, which will be found set out at length at pages 83 and 84.

The grounds of demurrer stated by Defendant Finley are covered by specifications of demurrer filed by other defendants, with the exception of defence of laches, contained in the fourth specification thereof (p. 84).

For the sake of brevity, we will not attempt to set out in detail in the statement of the case the numerous grounds of demurrer specified, as each will be noticed in its proper place in the argument, and may be found by reference to the record, pages 79 to 84, inclusive.

After the demurrers were filed, and before the hearing thereon, the bill was amended, by leave of court, by inserting therein a more specific allegation of error in the construction of the law by the Secretary of the Interior. (See Record, p. 86.)

The several issues raised by the bill and exhibits, and the demurrers thereto, may be divided into two general classes, namely:

(1) Those issues which are technical in their character, and do not go to the merits of the case; and

(2) Those issues which go to the merits of the case, and raise the contention that there is no equity in the bill of the complainants.

Those specifications of demurrer which are technical in character and do not go to the merits of the case are substantially as follows:

(1) That there is no specific allegation of error of construction of law by the Land Department in the bill of complaint.

(2) That the bill presents mixed question of law and fact, which have become *res adjudicata* by departmental decision, and cannot be reviewed by a court of equity.

(3) That the bill, with amendments, is vague, insufficient and indefinite.

(4) That the bill does not show any fraud, knowledge of fraud, mistake or illegality on part of defendants.

(5) That defendants are *bona fide* purchasers for value without notice.

(6) That complainants are precluded from relief by laches.

(7) That the suit is barred by the Florida Statute of Limitations.

Those specifications of demurrer going to the merits of the case raise two general issues:

(1) Did Robert J. Hackley, or his legal representatives, acquire any right to or interest in the land in controversy under the act of 1826 by virtue of the settlement and cultivation thereof by said Hackley in 1823–'24, and the subsequent acts of said Hackley and his legal representatives? and—

(2) If said right or interest was acquired, has same been forfeited by the alleged failure of Hackley, or his legal representatives, to comply with the conditions subsequently imposed by the act under which they claim?

None of the technical objections to the bill were sustained by the Circuit Court.

The Circuit Court below, in its opinion, filed as a part of its order (R., p. 88), bases its decision, sustaining the demurrer, upon the *sole ground* that at the time of the passage of the act of April 22, 1826, the tract of land in controversy was "rightfully claimed" by "some other person," thus excepting it "from the right of *pre-emption which would otherwise have* attached" (italics ours); holding that the "person" so claiming this tract of land was the United States Government, by virtue of the occupancy thereof by a detachment of troops under the command of Colonel Brooke.

The language of the court, to the effect that the right of pre-

emption would have attached but for the fact that in its opinion the land, at the time of the passage of the act of 1826, was rightfully claimed by some other person, is in effect to overrule the other grounds of demurrer specified by the defendants.

An appeal (R., p. 91) was duly entered and prosecuted to the United States Circuit Court of Appeals.

The opinion of the United States Circuit Court of Appeals, rendered upon the appeal of the appellants from the decision and decree of the Circuit Court, reads in full as follows:

> "After a careful examination and consideration of the elaborate decisions of Mr. Secretary Noble, Mr. Secretary Smith, Mr. Secretary Bliss and Judge Locke, all found in the transcript, and all adverse to the claims of the appellants, and a study of the very able briefs filed by eminent counsel, we are of opinion that the Judge of the Circuit Court properly ruled in sustaining the demurrer to the complainants' bill, and therefore the judgment appealed from is affirmed." (R., p. 97.)

The decree of the Circuit Court of Appeals (R., 96) is to the effect "that the decree of said Circuit Court in this cause be, and the same is hereby, affirmed," with costs.

From this decree an appeal to this court (R., p. 102), with assignments of error (R., p. 98), was duly filed and allowed (R., p. 103).

ASSIGNMENT OF ERRORS.

I.

The court erred in affirming the decree of the Circuit Court, made and entered in this cause on the 7th day of February, 1902.

II.

The court erred in not making and entering a decree in favor of complainants and appellants against the defendants and appellees, and in not requiring the defendants and appellees to convey to the complainants and appellants the land described in the bill of complaint in this cause, as amended, and to account to the complainants and appellants in accordance with the prayers of said bill as amended.

III.

The court erred in not making and entering a decree that the complainants and appellants were the equitable owners of the property described in the bill of complaint as amended, and entitled to a conveyance of the legal title thereto.

IV.

The court erred in holding that the land described in the bill of complaint as amended was rightfully claimed, used and occupied and held by some other person in behalf of the United States at the time of the act of 1826 (the same being entitled "An act giving the right of pre-emption in the purchase of lands to certain settlers in the States of Alabama, Mississippi, and Territory of Florida"), so as to prevent the attachment of a right of pre-emption claimed in said bill of complaint as amended to have been granted by said act to Robert J. Hackley, the ancestor of the complainants and appellees.

V.

The court erred in sustaining the demurrer of the defendants and appellees to the bill of complaint as amended of the complainants and appellants.

VI.

The court erred in holding and adjudging that the defendants and appellees were entitled to recover costs herein, and said decree is erroneous in adjudging and decreeing that the defendants and appellees should recover of the complainants and appellants costs of this cause in said court, and that an execution might be issued out of the said Circuit Court therefor.

VII.

The court erred in dismissing the bill of complaint of the complainants and appellants, and the decree is erroneous in so ordering and adjudging.

ARGUMENT.

The attention of the court has been called, in the statement of the case, to the fact that the Circuit Court based its decision entirely upon the conclusion that the words "other person," as used in the act of 1826, embraced the military occupancy by the United States troops. It will also be seen that the Circuit Court of Appeals affirmed said decree of the Circuit Court in general terms, and gave no other reasons for its conclusions; yet, as we understand the status of this case before this court, even if this court be of opinion that the court below erred in its decision upon the point on which it sustained the demurrers, still it will look to all the grounds of the demurrers specified to find if, upon the whole case, the decision of the court was right or wrong. It becomes necessary, therefore, to argue the whole case before this court, and, after careful consideration, we have reached the conclusion that it can be most briefly and logically presented by a consideration of the points in their natural order, rather than by an attempt to meet at once the point raised by the court below in its opinion.

We will endeavor, therefore, to argue each of the points raised by the various specifications of demurrer, in their logical order, considering first those which go to the merits of the case; and, second, those which are technical in their character, and in the proper place will notice at length the point upon which the court below sustained the demurrers.

Even at the risk of some repetition, we will endeavor to so segregate our arguments upon the various points at issue as to enable the court to turn readily to the argument upon any one of the issues which it may desire to consider and examine.

Upon demurrer, of course all of the facts alleged in the bill are admitted, and exhibits filed with the bill are to be read as a part thereof.

> "In passing upon questions raised by the demurrers, the exhibits filed with the bill are to be read as a part of it, and the statements found in them must be accepted as true against the demurrants." (*Ulman* v. *Iaeger, et al.*, 67 Fed. Rep., 980, 982.)

With this principle in mind, let us examine the various demurrers to the bill.

PART I.

OF SPECIFICATIONS OF DEMURRER WHICH GO TO THE MERITS OF THE CASE.

PART I.

THE SPECIFICATIONS OF DEMURRER WHICH GO TO THE MERITS OF THE CASE.

The contention of the demurrants that the bills are without equity is based upon two general grounds, each of which embraces several points raised by the demurrers. These general grounds are:

1. That Robert J. Hackley, or his legal representatives, *never acquired* any right to, or interest in, the land in controversy by virtue of the settlement and cultivation thereof by Hackley in 1823–'24, and the subsequent acts of Hackley and his representatives.

2. That if Robert J. Hackley, or his legal representatives, ever acquired any right to, or interest in, said land, such rights or interests *have been forfeited* by the alleged failure of Hackley and his said representatives to comply with the requirements of the laws of the United States.

Our brief upon this branch of the case will be divided into two sections, treating these general propositions in the order named, and each of the grounds of demurrer assigned will be noticed in its proper place.

It is important, however, that the court should keep constantly in mind throughout the discussion of this case the distinctions between cases of this character and cases in which there is a contest between claimants of public lands and the United States, for the principles of law and the rules of construction governing cases to which the United States is a party are entirely different from those in which the contest is between private individuals, in which the government has no interest.

Thus in *Frisbee* v. *Whitney,* 9 Wall., 187, it is expressly held by the Supreme Court that a pre-emption right which is *not good against the United States* may confer upon the *bona fide* settler "a preference over *others* . . . which the land officers are

bound to respect"; and that "this right may be protected by the courts against the claims of other persons who have not an equal or superior right."

In the case at bar the title has passed from the United States forever, and the government is no longer interested in the controversy. It is a contest between private parties, in which the prior settlement of Robert J. Hackley, and the constant efforts of himself and his legal representatives for a period of seventy-five years to protect the rights and interests acquired by that settlement, are admitted, and in which the defendants, whose claims were not initiated until the lands were valuable and free from difficulties or dangers, are trying by technicalities to defeat rights founded upon prior settlement, made for the purpose of securing a home, when the country was a trackless forest, and the undertaking replete with danger and difficulty. In such a case the equities are all with the earlier settler, and the courts will recognize and establish his right, unless to do so would be to violate some settled rule of law.

SECTION I.

DID ROBERT J. HACKLEY OR HIS LEGAL REPRESENTATIVES ACQUIRE ANY RIGHT TO, OR INTEREST IN, THE LAND IN CONTROVERSY, BY VIRTUE OF THE SETTLEMENT AND CULTIVATION THEREOF BY SAID ROBERT J. HACKLEY IN 1823–'24, AND THE SUBSEQUENT ACTS OF SAID HACKLEY AND HIS LEGAL REPRESENTATIVES?

To answer this general inquiry involves the discussion of several of the most important points raised by the demurrers, and the construction of the statutes of the United States under which the complainants claim. It is necessary at the outset, therefore, to ascertain the rules by which those statutes are to be construed, and the contention of Hackley heirs thereunder.

I. Rules of Construction.

It is a canon of construction and interpretation of statutes that the courts must so construe the law as to effect the object designed by the Legislature, and to this end its provisions must be examined in the light of surrounding circumstances at the time of their enactment and of preceding history.

Thus, in *Sieman's Adm'r* v. *Sellers,* 123 U. S., 276, 285, the Supreme Court of the United States says:

> "No doubt the words of a law are generally to have a controlling effect upon its construction, but the interpretation of those words is often to be sought from the *surrounding circumstances* and *preceding history.*" (Italics ours.)

And, again, the same court says, in the case of *In re Ross,* 140 U. S., 453, 475:

> "It is a canon of interpretation to so construe a law or a treaty as to give effect to the object designed, and for that purpose all of its provisions must be examined in the light of *attendant and surrounding circumstances.* To some terms and expressions a literal meaning will be given, and to others a larger and more extended one. The reports of adjudged cases and approved legal treatises are full of illustrations

of the application of this rule. The inquiry in all such cases is as to what was intended in the law by the Legislature, and in the treaty by the contracting parties." (Italics ours.)

See also *Ross* v. *Borland,* 1 Peters, 654.
Edwards v. *Dorby,* 12 Wheat, 210.
Gibbons v. *Ogden,* 9 Wheat, 1.

The statutes which the court will be called upon to construe, and under which the complainants claim, were passed more than seventy-five years ago, when the conditions and circumstances were entirely different from those now existing, or such as have existed for many years past. It is essential, therefore, to a proper construction of these statutes and an intelligent adjudication of the questions at issue, that we should review briefly the history and development of the public land system and the legislation bearing thereon; and examine the "surrounding facts and circumstances" existing at the time of the enactment of this statute.

Smith v. *Townsend,* 148 U. S., 490.

Let us briefly review the history of this legislation to ascertain the facts and circumstances surrounding the passage of the act, and the intent of Congress therein.

The Development of the Public Land System.

A review of the history of the public land system will show that the policy of the government with reference to the disposition of the public lands has undergone an entire change during the past one hundred years; yet throughout this period a controlling consideration with every department of government has been the recognition and protection of *bona fide* settlers, who entered upon the public lands for the purpose of securing and establishing a home.

The development of the system for the disposition of public lands may be divided into three eras: the first extending from the beginning of the government to the enactment of the general pre-emption act in 1841; the second, from 1841 to the passage of the homestead act in 1862, and the third, from 1862 down to the present time.

Legislation during these three eras was based upon different principles and policies, and it necessarily follows that in the construction of statutes (passed in these different eras, and under varying conditions, and to give effect to different policies), and in the application of authorities construing these statutes, the historical facts and circumstances must be carefully considered.

1. *The Land System from* 1783 *to* 1841.

In the early history of the country the public lands were regarded as assets of the government, to be sold to the best advantage, the proceeds therefrom to be used in the payment of current expenses, and in the extinguishment of the public debt. During the period from 1783 to 1841 the general policy of the government with respect to the disposition of the public lands was based upon this idea. The general method of disposition during this period was to have certain districts surveyed, and, by proclamation of the President, to give notice of public sale of such surveyed lands, which sale would continue for a limited period of time. At these sales the lands in the surveyed district described in the proclamation were offered at auction and purchased by the highest bidder, no bid of less than one dollar (and in some instances of two dollars) per acre being accepted. After this auction sale had taken place, any lands within the surveyed district not disposed of at such sale were open to private entry for a cash price varying in different cases, but generally $1.25 per acre.

The rapid increase in the population of the country, and the fertility of the lands west of the then settled area, soon led to settlements being made on public lands *ahead of the surveys,* and when the survey was made, and the lands offered at public sale, speculators came in from the settled districts and purchased those lands which had been improved by the earlier settlers. The pioneers, who had expended their resources in opening up wild lands and in building homes, were at the mercy of these speculators, who could easily outbid them at the public sale.

It thus became necessary early in the history of the country, as new districts were opened to sale, to pass special acts for the protection of pioneers, who had settled ahead of the surveys,

and, in the face of hardships and dangers, were extending the borders of civilization, and transforming the waste territory into homes of industry and usefulness. These special acts gave to the settlers upon the public lands ahead of surveys in the districts named in the acts, a preference, or pre-emption right in the purchase of such lands as they had settled upon and cultivated prior to a given date. They were known as pre-emption acts, but they were entirely different in terms and in principle (as we shall attempt to show) from the general pre-emption act of 1841, and legislation subsequent to that date.[1]

The purpose and intent of the special pre-emption acts prior to 1841, and the objects for which they were passed (which should be the controlling consideration in their construction) will be more clearly seen from a brief examination of some of the more important of these acts, and the circumstances surrounding their enactment.

The first pre-emption act was passed in 1801 for the protection and benefit of certain settlers in the Ohio Territory. Prior to this date the government had sold by contract to one Symmes and associates several hundred thousand acres of land in this territory. Before the limits of this grant had been ascertained, settlers under contract with Symmes made settlement upon what they supposed to be a part of the grant, but when its limits were finally ascertained, it was found that many of these settlements were upon the public lands not included in the Symmes grant. To protect these settlers, who had entered upon the land in good faith, Congress passed an act giving them the right of pre-emption in the purchase of the lands upon which they had settled when the same were opened for sale.

Between 1801 and 1841 there were sixteen such pre-emption acts passed, the more important of these being the acts of February 5, 1813 (2 Stats. 979), giving the right of pre-emption in the purchase of certain lands to settlers in the Illinois Territory; the act of April 22, 1826, giving the right of pre-emption to purchase certain lands, to settlers in Florida, Alabama and

[1] For a full discussion of the early land system, the court is referred to *The History of The Public Domain*, compiled by Thomas Donaldson, and published by the Public Land Commission, 1881, Chap. VIII.

Mississippi (under which the complainants claim), and the act of May 29, 1830 (4 Stats. 420), giving the right of pre-emption to settlers upon public lands prior to the passage of that act.

We cannot undertake at this point to examine in detail the provisions of these acts, or the circumstances surrounding the enactment of each. They were similar in their general provisions, though differing in some details, and the purpose in every instance was to confer the preference right in the purchase of land upon *past settlers,* being exceptions from the prevailing general laws for the disposition of public lands.

The general character of these acts may be gathered from the act of April 22, 1826 (4 Stats., 154), under which the complainants claim. This act provides:

> "That every person, or the legal representatives of any person, who, being either the head of a family or twenty-one years of age, did, on or before the first day of January, in the year one thousand eight hundred and twenty-five, actually inhabit and cultivate a tract of land situate in the Territory of Florida, which tract is not rightfully claimed by any other person, and who shall not have removed from the said Territory, shall be entitled to the right of pre-emption in the purchase thereof, under the same terms, restrictions, conditions, provisions, and regulations in every respect, as are directed by the act entitled 'An act giving the right of pre-emption in the purchase of lands to certain settlers in the Illinois Territory,' passed February the fifth, one thousand eight hundred and thirteen."

The conditions here referred to were that the right should be *forfeited* for failure to give notice of claim to the register and receiver at least two weeks before the beginning of public sales.

By reference to contemporaneous records, it will be found that in every instance the necessity for the enactment of these special statutes arose from the fact that settlers, in obedience to the pioneer spirit of the age, had gone ahead of public surveys, often into territory from which the Indians had not been removed, and, in the face of dangers and hardships, had established homes, and opened the otherwise waste lands to cultivation, with resulting benefits to the country at large; that but for these acts the homes so established would have been at the mercy of speculators when

the lands were opened for public sales. The debates of Congress throughout this era, as well as other public records, bear eloquent testimony to the force with which the rights and equities of these early settlers appealed, not only to the legislature, but to every department of government, and it was for their relief and protection that the various acts from 1801 to 1841 were passed.

As an illustration of these conditions, and of the considerations which appealed to Congress, the court is referred to the debates upon the act of 1826, found in the Congressional debates for that session, page 1422 and the following pages, printed in the Appendix to this brief.

Soon after the Territory of Florida was acquired from Spain in 1819, steps were taken to open the public lands to settlement. As early as 1823 the President had been authorized to establish land offices in the districts of Florida as soon as sufficient lands were surveyed. The making of these surveys, however, was delayed by Indian troubles, and, as in the case of other public lands, settlers had gone ahead of surveys, established their homes, and begun the cultivation of the land, anticipating, no doubt, that the then settled policy of Congress would be upheld, and that an act would be passed, giving them the right of pre-emption in the purchase of the lands so settled before they were offered for public sale. The conditions then existing are fully described in the debates upon the act in the House of Representatives, from which we quote the following statement of Mr. White, of Florida, the patron of the bill:

> "I do not hesitate to believe that the land in the State in which these settlers found it was not worth more than the sum they are required to pay by this law. It is a sound principle in politics and ethics that he who benefits the public is entitled to his reward. That the country has been greatly improved by the labor of these individuals cannot be denied, and what will be their reward if this law does not pass? Their means of purchasing have been exhausted in the improvements of the country and the high prices of provisions; and the inevitable consequence will be that they will be turned from their homes, and forced from their plantations by the rapacity of the heartless speculator with but an inconsiderable augmentation to the treasury. You cannot conceive the distress it will occasion. They have, on account of

> the causes enumerated, but moderate means. They cannot enter the lists of competition with those who are attracted by their improvements the result of toil and labor, with which they have no participation, and for which they feel no sympathy." [1]

In 1830 these settlements upon the public lands ahead of surveys had become so extensive that a general act was passed giving to persons who had settled upon the lands prior to the day named, and were then in possession thereof, the right of pre-emption in the purchase of the same, and this act was afterwards extended by the acts of 1832 and 1834.

This brief review of the conditions existing during this era, and an examination of the provisions of the acts themselves, will show conclusively their purpose and intent, as well as the proper rules for their construction. It is well to notice that these acts did not establish any general pre-emption system. They had no reference to *future* settlements, but were *exceptions* to the general method of disposition by public sale then prevailing, exceptions brought about by the equities of the earlier settlers, and the benefits accruing to the country from their services. They were in the nature of *special grants* to a specific class of persons, like grants to educational institutions, and were for a past consideration, which had been completely executed at the time of the passage of the act. The declared intention and purpose of these acts was the relief and protection to the early settlers, who had made their settlements ahead of surveys, and it need hardly be suggested that it is an elementary canon of construction that this being the intent and purpose of Congress, the courts will so construe these acts as to protect and perfect the rights of any settler who comes within their terms.

Ross v. *Borland*, 1 Peters, 656.

2. *The Era from* 1841 *to* 1862.

For several years prior to 1841 there had been a strong and growing party in Congress demanding that the public lands

[1] See Appendix to this Brief for this debate in full, and valuable discussion of the circumstances leading to the enactment of Act of April 22, 1826. It is cited to show the "surrounding facts and circumstances," and the conditions which Congress sought to remedy. *Smith* v. *Townsend*, 148 U. S. 490.

should be disposed of so as to encourage future settlements, rather than for the best cash price—a sentiment which finally culminated in the homestead act of 1862. As early as 1826 an effort was made under the leadership of Mr. Benton to provide for the disposition of the public lands by entry instead of auction, and by *donation* of unsold lands to actual settlers. (Am St. Papers, Vol. IV., p. 892.) Several efforts had been made between 1830 and 1840 to pass some general pre-emption law making provision for *future* settlements. This movement resulted in the act of September 4, 1841. (5 Stats., 543.) This act provided:

> "That, from and after the passage of this act, every person being the head of a family, or widow, or a single man over the age of twenty-one years, and being a citizen of the United States, or having filed his declaration or intention to become a citizen, as required by the naturalization laws, who, since the first day of June, 1840, has made *or shall hereafter make* a settlement in person on the public lands, to which the Indian title had been at the time of such settlement extinguished, and which has been or shall have been *surveyed prior thereto,* and who shall inhabit and improve the same, and who has or shall erect a dwelling thereon, shall be, and is hereby, authorized to enter with the Register of the Land Office for the district in which such land may lie," etc. (Italics ours.)

The act of 1841 was the first pre-emption act providing for *future settlements,* and marked a radical change in the system for the disposition of public lands. (*Moore* v. *Robins,* 96 U. S., 530, 536; Donaldson on Public Domain, 215.) By this act Congress abandoned the system of disposing of lands by public sale, and adopted the system of pre-emption, by which the settler who went upon the land and established his home was permitted to purchase the same at a nominal price.

Before 1841 the system of sales was the general rule, and the pre-emption or relief acts were exceptions for the benefit of a certain meritorious class who made settlements ahead of surveys. Subsequent to that date the pre-emption system was the general rule, and only such lands were sold as were not pre-empted.

Thus, in Donaldson on Public Domain, p. 215, in speaking of the pre-emption system established by the act of 1841, it is said:

"The pre-emption system arose from the necessities of settlers, and through a series of more than fifty-seven years [1783 to 1841], in attempts to sell or otherwise dispose of the public lands. The early idea of sales for revenue was abandoned, and a plan of disposition for homes was substituted. The pre-emption system was the result of law, experience, executive orders, departmental rulings and judicial construction. It has been many-phased, and applied by special acts to special localities with peculiar or additional features, but it has always and to this day contains the germ of actual settlement, upon which thousands of homes have been made, and lands have been made productive, yielding a profit in crops to the farmer and increasing the resources of the nation."

While the pre-emption act of 1841 constituted a radical change in the method of disposing of the public lands, and established a permanent pre-emption system, based upon *future settlements,* subject to certain *conditions precedent,* yet it was but a half-way station, or compromise, between the old system of public sales and the homestead acts which were to follow later.

The act of 1841 was amended and approved by the subsequent acts of 1843, 1853 and 1854, but its general provisions have been retained, and it has remained the basis of the pre-emption system until March 5, 1891, when this law was repealed.

3. *The Third Era, from* 1862 *to the Present Time.*

The demand for a change in the land system, which would give greater advantages to the early settler, and for the abolition of the system of public sales, was not satisfied by the act of 1841. A strong and ever-increasing party insisted that the public lands should be *given* to the actual settlers who occupied, improved and cultivated them for a certain number of years, upon the payment only of the necessary fees to cover surveys and the making of the records. This became a national issue in 1852, and after a fierce political struggle in and out of Congress, culminated in the Homestead act of 1862, the passage of which marks the beginning of the third era in the development of the land system.

Donaldson describes this act as "the third and most important step in the history of the public land system." The examination

of its provisions, however, and of the homestead laws is not pertinent to the inquiries now before the court.

From 1862 down to the present time the general disposition of the public lands of the agricultural class has been under the pre-emption system as established by the act of 1841, and the homestead system established by the act of 1862, with such amendments as might be necessary to perfect these systems under the varying conditions.

In addition to the general system for the distribution of the public lands under the acts to which we have referred, there have been special acts from time to time, such as educational grants, swamp-land grants, donation acts, etc., making grants or conferring privileges for the promotion of education, to encourage the settlement and improvement of the public lands, and similar purposes conceived to be for the public good. There is a striking analogy between these special acts, constituting, as they do, exceptions from the prevailing system and making grants *in presenti* of the public lands for quasi public purposes, and the early pre-emption acts, such as that under which the complainants claim; which analogy will be brought more to the attention of the court hereafter. Indeed, the early pre-emption acts being exceptions from the then existing system, were, in fact, special grants, for a past and executed consideration, to a defined class of persons.

This brief sketch of the public land system is sufficient to show:

(1) That from the earliest times the relief and protection of the first settlers has been a controlling consideration with every department of the government; that first the protection and afterwards the encouragement of *bona fide* settlements for the purpose of making a home has been regarded as a most important consideration in the disposition of the public lands—a consideration which finally led to the practical abandonment of the system of sales and the enactment of the pre-emption and homestead laws.

(2) That the pre-emption acts prior to 1841 were entirely different in terms and in theory from the act of 1841 and subsequent pre-emption acts, and are subject to different rules of construction.

Since the failure of the Interior Department to distinguish between these different classes of pre-emption acts and the rights given thereunder, as well as the failure to distinguish the authorities and rules of construction applicable thereto; and the failure to consider the historical facts surrounding the act under construction, constitute the radical and fatal errors in the decision of that department upon the Fort Brooke cases, we deem it important to get these distinctions clearly before the court as a basis for the rules of construction by which we will attempt to ascertain the rights of the Hackley heirs under the act of 1826.

The more important distinctions between these two classes of pre-emption acts may be summarized as follows:

(*a*) The special pre-emption acts prior to 1841 gave the right of pre-emption *only* to persons who had settled upon, inhabited and cultivated the public lands within the district covered by the act, *before the date of its passage, or before some antecedent date named in the act; e. g.,* the act of 1826 only gave the right of pre-emption to such persons as had settled upon the land in the district described prior to January 1, 1825.

The act of 1841 gave the right of pre-emption to any person coming within its terms who should make *future settlement upon the public lands* and comply with certain *conditions precedent,* named in the act.

(*b*) The special pre-emption acts prior to 1841 gave the right of pre-emption in consideration of *past* settlement and cultivation, thus being in effect *grants in presenti* of an immediate, equitable *interest in or title to* the land to which the early settler might be entitled under their terms, in consideration for the *benefits which the public derived* from the services of the pioneers for whose protection the acts were passed; subject only to *forfeiture* for failure to perform certain *conditions subsequent.*

The act of 1841 and subsequent pre-emption acts gave the right of pre-emption to *future settlers* upon the performance of certain *conditions precedent.*

It is a well-settled principle of law that a court of equity will not enforce a forfeiture on account of failure to perform conditions subsequent, except in the clearest cases, and such forfeiture can only be enforced by the grantor who imposed the condition.

It is equally well settled that where the vesting of a right or interest is dependent upon the performance of conditions precedent, the person claiming that right or interest must perform those conditions strictly and literally, before any right whatever is acquired.

Holden v. *Joy,* 17 Wall., 211.
Schoonburg v. *Harrison,* 16 Wall., 44.
Davis v. *Gray,* 16 Wall., 203.

In the light of these principles the immense importance of the distinctions between the early pre-emption acts and the act of 1841, and subsequent acts, will be appreciated. Indeed, without carefully distinguishing the terms, as well as the theory and intent of these acts, and the historical circumstances surrounding the enactment, the authorities construing the various pre-emption acts cannot be intelligently considered.

Thus, in the opinion of the Secretary of the Interior, dated November 25, 1892, the case of *Frisbee* v. *Whitney,* 9 Wall., 187, is cited with approval as a controlling authority in defining the nature and character of a pre-emption right, in the following language:

> "In the case of *Frisbee* v. *Whitney* (9 Wall., 187), the Supreme Court held that occupation and improvement of the public lands, with a view to pre-emption, conferred no vested right in the lands so occupied; that such vested right is only obtained under the pre-emption laws where the purchase-money has been paid and the receipt of the proper land officer given to the purchaser," etc.

It may be noted, however, that in *Lytle* v. *Arkansas,* 9 How., 314, 334, the Supreme Court of the United States, in construing the pre-emption act of 1830, and in speaking of the nature of a pre-emption right acquired thereunder, said:

> "The claim of pre-emption is not that shadowy right which by some it is considered to be. Until sanctioned by law it has no existence as a substantive right; but when covered by law, it becomes a legal right, subject to be defeated only by failure to perform the conditions annexed to it."

These expressions of the Supreme Court are conflicting upon their face, as one says that no right is acquired until the money

is paid and all conditions performed, while the other says that when covered by law (that is, when the act is passed giving the former settler the pre-emption right) it is a legal right subject only to forfeiture by failure to perform conditions subsequent. When, however, these expressions are considered with reference to the act which the court is construing in each case, and the historical facts and circumstances, there is no conflict, because under the act of 1841, and subsequent acts, which the court was considering in the case of *Frisbee* v. *Whitney*, the pre-emption right was contingent upon the performance of *conditions precedent*, all of which must be fully performed before *any right whatever* is vested; while the court in *Lytle* v. *Arkansas* was considering one of the earlier pre-emption acts passed, as we have seen, for the protection of former settlers, giving the right of pre-emption for a past and executed consideration, and, therefore, it gave an *immediate vested right*, subject only to *forfeiture*, as stated by the court.

This is but one of the many radical errors in the application of authorities by the Interior Department, but it is sufficient to show the superficial character of the investigation upon which those decisions were based. It also shows the necessity for understanding clearly the distinction between the nature and character of these two classes of pre-emption acts, and the historical facts and circumstances surrounding them, before we undertake to consider the acts themselves.

(*c*) Most of the pre-emption acts passed *prior* to 1841 gave the right of pre-emption to settlers upon the *unsurveyed public lands*. And the first section of the act of February 5, 1813, which was incorporated into the act of April 22, 1826, expressly recognizes unsurveyed lands as subject to the pre-emption claims of the persons affected by these acts. An examination of the historical facts shows that the right there given applied especially to purchasers who had settled upon public lands *ahead of surveys*.

The act of 1841 confined the pre-emption right given to *future settlers* to lands which had been *surveyed at the time the settlement was made*. This distinction is clearly upon the face of the acts themselves, but a failure to notice it led the Interior Department into serious error, and is a basis for one of the grounds of demurrer in this case.

From this brief review of the historical development of the land system, of the facts and circumstances surrounding the enactment of the various pre-emption acts, and of the important distinctions between the early and the later pre-emption acts, we deduce the following rules of construction governing the consideration of the claims of the Hackley heirs under the pre-emption act of 1826:

(1) The court must strive to ascertain the intent and purpose of Congress, and to so construe the various acts bearing upon the Hackley claim as to give effect to that intent.

(2) In striving to ascertain the legislative intent, the court will look to preceding history upon the subject, and to the facts and circumstances surrounding the enactment of the statute under consideration.

(3) The early pre-emption acts prior to 1841, being remedial in their character, and having been passed for the purpose of protecting a meritorious class of settlers, a court of equity will construe those acts liberally in favor of said settlers to accomplish the purpose which Congress had in view.

(4) The act of 1826 having given a present interest in or right to land for a *past* and *executed consideration*, subject only to *forfeiture* for failure to perform *conditions subsequent*, such forfeiture will not be enforced except upon demand of the grantor, and where there is a clear case of violation of the conditions subsequent named in the act or grant.

(5) The act of 1841 and subsequent pre-emption acts being entirely different in theory and in terms from the earlier acts, and the rights given thereby being rights *in futuro*, subject to certain *condition precedent* (entirely different in character from the rights given under the earlier acts), the authorities construing the act of 1841 and subsequent acts cannot be considered as governing or affecting the construction of the act of 1826 and the earlier pre-emption acts; but these early acts must be construed in accordance with their terms and intent, and upon decisions construing similar acts.

(6) That in the construction of the statutes bearing upon the complainants' claims, the court will look to contemporaneous construction of such acts by the executive departments of the

government having in charge the execution of the same, and will be governed by the construction given by such executive department, unless the same be clearly erroneous.

United States v. *Philbrick,* 120 U. S., 52.
United States v. *Johnson,* 124 U. S., 236.
Robinson v. *Bradbury,* 132 U. S., 491.

With the historical facts and circumstances and rules of construction before us, let us next consider the claim of the Hackley heirs under the act of April 22, 1826.

II. The Claim of Robert J. Hackley and His Legal Representatives under the Act of April 22, 1826.

Before taking up in detail the specifications of demurrer, it is well to have clearly before the court the provisions of the act of April 22, 1826 (4 Stats., 154), and the claim of the complainants thereunder.

We will inquire (1) whether, upon the facts of this case found by the Interior Department, and admitted by the demurrer, Robert J. Hackley, and his legal representatives come within the terms of the act of April 22, 1826, and (2) if so, what was the nature and extent of the right or interest given by that act.

1. Do Robert J. Hackley and His Legal Representatives Come Within the Terms of the Act of April 22, 1826?

This act, so far as applicable, reads as follows:

> "That every person, or the legal representative of any person, who, being either the head of a family or twenty-one years of age, did, on or before the first day of January, in the year one thousand eight hundred and twenty-five, actually inhabit and cultivate a tract of land situated in the Territory of Florida, which tract is not rightfully claimed by any other person, and who shall not have removed from said Territory, shall be entitled to the right of pre-emption in the purchase thereof, under the same terms, restrictions, conditions, provisions and regulations in every respect, as are directed by an act, entitled 'An act giving the right of pre-emption, in the purchase of lands, to certain settlers in Illinois Territory,' passed February the fifth, one thousand eight hundred and thirteen; *Provided,* That no person shall be entitled to the provisions of this section who claims any tract of land in said Territory by virtue of a confirmation of the commissioners, or by virtue of any act of Congress."

The "terms," etc., of the act of February 5, 1813, referred to above, are as follows:

> "That every person, or legal representative of every person, who has actually inhabited and cultivated a tract of land lying in either of the districts established for the sale

of public lands, in the Illinois Territory, which tract is not rightfully claimed by any other person, and who shall not have removed from said Territory; every such person and his legal representatives shall be entitled to a preference in becoming the purchaser from the United States of such tract of land in every respect, as are or may be provided by law for the sale of other lands sold at private sale in said Territory, at the time of making such purchase; *Provided,* That no more than one-quarter section of land shall be sold to any one individual, in virtue of this act; and the same shall be bounded by the sectional and divisional lines *run, or to be run,* under the direction of the Surveyor-General for the division of the public lands. *Provided also,* That no lands reserved from sale by former acts, or lands which have been directed to be sold in town lots, and out lots, shall be sold under this act."

"That every person claiming a preference in becoming the purchaser of a tract of land in virtue of this act, shall make known his claim by delivering a notice in writing to the Register of the Land Office for the district in which the land may lie, wherein he shall particularly designate the quarter section he claims; which notice the register shall file in his office, on receiving twenty-five cents from the person delivering the same. And in every case where it shall appear to the satisfaction of the Register and Receiver of Public Moneys of the Land Office, that any person, who has delivered his notice of claim, is entitled, according to the provisions of this act, to a preference in becoming the purchaser of a quarter section of land, such person, so entitled, shall have a right to enter the same, with the Register of the Land Office, on producing his receipt from the Receiver of Public Moneys, for at least one-twentieth part of the purchase-money, as in case of other public lands sold at private sale; *Provided,* That all lands to be sold under this act shall be entered with the Register at least two weeks before the time of the commencement of the public sales in the district wherein the land lies; and every person having a right of preference in becoming the purchaser of a tract of land, who shall fail so to make his entry with the Register, within the time prescribed, his right shall be forfeited, and the land by him claimed shall be offered at public sale, with the other public lands in the district to which it belongs."

The provisions of the act of 1813, in relation to forfeiture, will be considered hereafter.

The bill alleges (Record, p. 5), and it is admitted, that Hackley never claimed any land in the Territory of Florida by virtue of a confirmation of commissioners, or by virtue of any act of Congress, so this provision of the act of 1826 has no bearing upon this case.

An analysis of the above statutes will show that a person, in order to be entitled to the right of pre-emption thereunder, must fulfill the following requirements:

(1) He must be a *person,* or the *legal representative* of a person, who was either the *head of a family,* or *twenty-one years of age* on or before the *1st of January,* 1825.

(2) He must have *actually inhabited and cultivated* a tract of land situated in the Territory of Florida, on or before the *first day of January,* 1825.

(3) Such tract of land must not have been *rightfully claimed* by any other *person* on the *22nd day of April,* 1826.

(4) He must not have *removed from the Territory* of Florida on or before the 22nd of April, 1826.

Any and every person who could, at the date of the passage of the act, fulfill the four above-named requirements, was given the *absolute right of pre-emption* to lands surveyed or unsurveyed, the tracts to be bounded by the lines of the surveys "run, or to be run," as of the date of the act, to-wit, April 22, 1826. Let us test the Hackley claim by these conditions.

1. The claimant must be a *person,* or the *legal representative* of a person, who was either the head of a family or twenty-one years of age on or before the 1st of January, 1825.

It is alleged in the bill (R., p. 5) that at the date of his settlement in 1823, Robert J. Hackley was *twenty-one years of age,* and then the *head of a family,* and this is found as a fact by the different officers of the Interior Department in their several opinions filed as exhibits with the bill. It is thus seen that Robert J. Hackley came within the terms of the act of 1826, as to age, and being the head of a family, and that the complainants in this case come within the express language of the act, being the *legal representatives* of such person.

2. He must have *actually inhabited and cultivated* a tract of land situated in the Territory of Florida, on or before the *first day of January,* 1825.

Upon this point the bill (at page 5) contains the following allegation, which is admitted on demurrer:

> "Your complainants further show that about the month of November, 1823, the said Robert J. Hackley, who was then over twenty-one years of age and the head of a family, settled, inhabited and cultivated a certain tract of land situated on the east side of Hillsborough river, at its confluence with the eastern arm of Tampa bay, sometimes known as Hillsborough bay, in what was then the Territory now the State of Florida."

The several officers of the Interior Department, including both Secretaries, who passed upon this case, found as a fact that Hackley did settle upon, inhabit and cultivate the tract of land described in the bill in the year 1823–'24; that he made such settlement in good faith for the purpose of securing a home, and that at the time such settlement was made the land was far removed from civilization, and was a trackless forest.

It will thus be seen that Hackley comes within the express terms of the second requirement of the act of 1826.

3. Such tract of land must not have been *rightfully claimed* by any other *person* on the 22nd day of April, 1826.

The bill alleges in terms that "said tract of land was not rightfully claimed by any other person on or before the 22nd day of April, 1826" (page 5). It is contended that temporary occupancy by the troops of the United States in camp was a rightful "claim" by some "other person." This contention will be fully considered hereafter. The record shows clearly that, as a matter of fact, no "person" except Hackley ever pretended to make "claim" to this land until after it was restored to the public domain in 1883, and the "claims" of the defendant Carew were initiated.

4. He must not have removed from the Territory of Florida on or before the 22nd of April, 1826.

The bill alleges as a positive fact (R., p. 5), and it is admitted, not only that Hackley had not removed from the Territory of Florida at the time of the passage of this act, but that he continued to reside in that Territory and State until his death, in 1845, at Tallahassee; and this is found to be a fact by all the officers of the Interior Department in their several opinions in this case. It is thus seen that Hackley comes within the express terms of this, the fourth and last requirement of the act.

It is respectfully submitted, therefore, that the claim of Hackley could not have been more accurately covered if Congress had had his specific claim in mind at the time of the passage of this act. It is a recognized principle that where a statute "is plain, certain and unambiguous, so that no doubt arises from its own terms as to its scope and meaning, a bare reading suffices, then interpretation is needless." The act being plain in its terms, the court must give it effect.

Sutherland on Construction of Statutes, Sec. 234.
United States v. *Hartwell,* 6 Wall., 395.
United States v. *Wiltberger,* 5 Wheat, 95.

Not only does the claim of Robert J. Hackley and his legal representatives come within the letter and terms of the statute of April 22, 1826, which fact is conclusive upon the court, but the equity of the claim is strengthened by a consideration of the facts upon which it is based, and the historical circumstances surrounding the enactment of that statute which show that this claim is fully within the purpose and intent, as well as the terms thereof.

We have already seen, in our review of the circumstances which led to the enactment of these early pre-emption acts, that they were relief acts for the protection of settlers who, in obedience to the pioneer spirit of that age, went upon the public lands, and made settlements ahead of surveys, often when the land settled upon was a trackless forest, and that such acts were necessary to protect settlers from the avarice of speculators, who afterwards came in to purchase the land when the same was open for sale.

It will appear from the record, and is an historical fact, of which the court will take notice, that the Indians were removed

from the section of Florida in which the land in question is located in 1824. (See Debates on Act of 1826, in Appendix.) The record shows that Hackley, who was a Virginian, went from New York to Southern Florida, selected the land in question as a place upon which to build his home, erected a house, and began the cultivation of the land. The conditions then existing may be best described in the language of the Register and Receiver and the Commissioner of the General Land Office, found in the opinion of the latter, filed as an exhibit with the complainants' bill. These officers says (R., p. 27):

> "The letters on file in support of Mr. Hackley's claim show that Hackley moved to the Territory of Florida in 1824, when it was a dense wilderness, his only companions being Indians, alligators, panthers and wolves, and that he dwelt upon the reservation for some time prior to the arrival of Colonel Brooke. This seems to us to entitle his claim, or that of his heirs, who shared with him the privations of frontier life, to serious consideration, and believing that Hackley made entry in good faith, and for the purpose of securing a home under the provisions of the acts of 1813 and 1826, then in force, we consider his claim superior, in the absence of adverse claims, to the claims made after the abandonment of the fort in 1883.

Again, in this opinion, it is said:

> "Hackley's settlement antedates all other claims, antedates the selection of the site for a cantonment, antedates the reservation. He appears, in fact, to be the first white man who ever lived on this land. He unquestionably is fully protected by the act of 1826, that of 1858, and that of July 5, 1884. He meets the requirements of the first provision of the second section of the latter act."

These findings of facts as to Hackley's settlement, and the conditions surrounding it, are repeated almost in terms by the Secretaries of the Interior in their respective opinions in this case.

It was to protect just such settlers, and to cover just such claims, that the act of 1826 and other pre-emption acts prior to 1841 were passed by Congress. Indeed, the protection of these early settlers, and the encouragement of such settlements, has had the careful attention of every department of the government from

the earliest periods in its history. Their rights and equities have appealed to the government, and have always met with recognition.

Lamb v. *Davenport,* 18 Wall., 307.

In speaking of these very settlers in the Territory of Florida, in the debates upon the act of 1826 (which are cited to show the existing facts and circumstances, and the ideas pervading Congress at the time), Mr. White, the patron of the bill, said:

> "The policy of all the governments on this side of the Atlantic has been to extend their settlements as widely as possible; to attach the inhabitants to the country, and their government, by giving them an actual share in the real property, that they might not in times of difficulty return the answer of the Roman people on Mount Aventine to the ambassadors of the Senate. Pioneers and adventurers of new colonies and settlements, formed under so many difficulties and privations, at the sacrifice of so many comforts, and contributing so many important benefits to the country, in increasing its facilities, extending its empire and protecting its borders, have always been, and ought to be, rewarded."

Again the same speaker said:

> "It is a sound principle in politics and ethics that he who benefits the public is entitled to his reward. That the country has been greatly improved by the labors of these individuals, cannot be denied."

Mr. Owen, another member of the House of Representatives, in speaking upon the same bill, is reported as follows:

> "He thought it was our true policy to grant to those who settled upon the lands the right of pre-emption; it was their labor which gave value to the lands; without it they would have had none. He considered it wise to encourage those who might with propriety be termed the pioneers of a more dense population. It was they who, by braving the dangers and overcoming the difficulties of an unsettled country, opened the way for the introduction of capital and all improvements of civilized existence."

It was upon arguments such as these (which will be found printed in full in the Appendix), and in the light of these "sur-

rounding facts and circumstances that Congress passed the act of 1826. They could not have more accurately described the Hackley claim if they had named it in the act.

Turning to the Executive Department of the government, we find it, too, has always recognized the equities of these earlier settlers, and has always sought to protect their rights. Evidence of this fact will be found in executive documents throughout the early history of the government, dealing with these pre-emption acts, some of which have already been quoted. The following sentence, quoted from the message of President Buchanan, in 1860, is but an illustration of many expressions to be found in contemporaneous records upon the subject:

> "The first settlers of a new country are the most meritorious class. They brave the dangers of savage warfare, suffer the privations of frontier life, and with the hand of toil bring the wilderness into cultivation. The 'old settlers,' as they are everywhere called, are public benefactors." (Donaldson, Pub. Dom., 343.)

The Judicial Department of government has not been less jealous in the protection of the rights of these early settlers, and in the recognition of their claims. An illustration of this is found in the case of *Lytle* v. *Arkansas,* 9 How., 334, in which the Supreme Court of the United States, in speaking of a pre-emption claim under the act of 1830 (which was similar in its general terms to the act of 1826), there sought to be overturned by the State of Arkansas, said:

> "The claim of a pre-emption is not that shadowy right which, by some, it is considered to be. Until sanctioned by law, it has no existence as a substantive right, but when covered by the law, it becomes a legal right, subject to be defeated only by failure to perform the conditions annexed to it. It is founded in an enlightened public policy, rendered necessary by the enterprise of citizens. The adventurous pioneer who is found in advance of our settlements, encounters many hardships, and not infrequently dangers, from savage incursions. He is generally poor, and it is fit that his enterprise should be rewarded by the privilege of purchasing a favored spot selected by him, not exceeding

one hundred and sixty acres. That this is the national feeling is shown by the course of legislation for many years."

See also *Wynn* v. *Morris*, 16 Ark., 414.
Lamb v. *Davenport*, 18 Wall., 307.

Many other expressions of the different departments of government with reference to these early pre-emption claims, might be cited to the same effect. Those quoted, however, are sufficient to establish our contention that the claim of Hackley and his legal representatives comes not only within the letter and the terms of the act of 1826, but comes fully within the spirit, the purpose, and the intent of that act; and that to fail to recognize that claim would defeat a most beneficent policy which was established by Congress, with reference to these early settlers, and violate some of the most elementary rules of statutory construction.

Let us next inquire what was the nature and extent of the interest given by the act of 1826.

II. The Nature and Extent of the Interest Granted by the Act of April 22, 1826.

In considering the nature and extent of the interest granted by Congress to settlers upon the public lands in the Territory of Florida, prior to the 1st of January, 1825, by the act of April 22, 1826, it is not improper, perhaps, to allude again to the fact that the complainants are not attempting to establish a claim against the United States Government—a suggestion which is made necessary by the fact that counsel for the demurrants have cited in this connection numerous cases to which the government was a party, as authorities controlling this case. Were it necessary, we feel confident that we could establish a claim to this land on behalf of the complainants which even the government itself, under well-settled principles, would be compelled to recognize; but no such necessity exists. The government has no interest whatever in this controversy, and the authorities deciding contest between claimants to public lands and the United States have no bearing upon this case. Different rules of construction are applicable; for grants, like charters, are construed strictly in

favor of the government, while in a contest between individuals claiming the public lands, it has been the universal policy of every department of government to construe legislation favorably to the first settler. It is well settled, also, that the courts will often recognize and protect the claims of an early settler against the claims of a subsequent settler, even though such claims would not be recognized as valid against the United States. This distinction is clearly drawn in the case of *Frisbee* v. *Whitney*, 9 Wall., 187, and authorities there referred to.

It is submitted, also, that the rights of Robert J. Hackley and his legal representatives must be tested by the facts and the law as they existed *at the time the Hackley claim was initiated.* If that right then vested we feel that it can be shown beyond controversy that it still exists.

Our contention is that the act of April 22, 1826, gave to Robert J. Hackley, by virtue of his settlement upon and cultivation of the tract of land in question, a *vested right to, or interest in, said land,* which right or interest vested in said Hackley for the benefit of himself and his legal representatives *immediately upon the passage of the act relating back to the date of settlement;* and that said right or interest (then good against the world) could only be divested by failure of said Hackley or his legal representatives to comply with a *condition subsequent* contained in the act of 1813, to which reference was made in the act of 1826, followed by some *act* on the part of the grantor (the United States) *enforcing the forfeiture;* that said conditions subsequent were fully performed, and the United States has never sought to enforce a forfeiture; that, therefore, the heirs of the said Robert J. Hackley are entitled to patents for said land, and the same should have been issued to them by the Interior Department.

We will consider the question of forfeiture hereafter. The vested character of the right acquired will appear from the terms of the act, and the facts of this case, under the authorities applicable thereto.

In support of our contention that the act of 1826 was a grant in *presenti* of an equitable right or interest in the land, we call attention first to the fact that the terms of the act are in the present tense. In the title it is called "An act *giving* the right

of pre-emption," &c.; the term "giving" in this connection being, under well-settled rules of construction, equivalent to "granting."

In the body of the act it is declared that the persons described "shall be entitled to the right of pre-emption in the purchase thereof," &c., which is equivalent to saying that they shall now, as of the date of the passage of the act, be entitled to this right, or vested with the interest resulting therefrom.

It will be further noticed that the act did not require that any condition be performed *before* the right given should vest. It gives an *immediate* right, subject only to forfeiture for failure to give notice of the claim at least two weeks before the public sale, which sale, it may be here remarked, *has never taken place.*

The vested character of this right or interest will more clearly appear, however, when we consider the nature of the transaction, and the consideration for which this right was granted.

The pre-emption act of 1826 was not a bounty; it was but an act of justice. By reference to contemporaneous records, it will be seen that Congress and the executive departments of the government regarded these pre-emption rights as a payment to the early settlers for the labor and service which they had performed in opening up the public lands and increasing the value of the territory contiguous to the lands upon which they had settled.

Thus in the debates upon the act of 1826 (see Appendix), Mr. White, of Florida, the patron of the bill, in speaking of the principle upon which the pre-emption right was granted, said:

> "Pioneers and adventurers of our new colonies and settlements, formed under so many difficulties and privations, at the sacrifice of so many comforts, and contributing so many *immediate benefits* to the country, in increasing its facilities, extending its empire, and protecting its borders, have *always been, and ought to be, rewarded.*" (Italics ours.)

Again, the same speaker says:

> "If any gentleman supposes that upon an enlarged view of this subject, the United States will lose by the passage of this law, he will be greatly mistaken, unless they avail themselves of the labor of those adventurous citizens without a *fair equivalent.* The *value* above the government price is

derived from *their labor*, and the *means they have furnished* in penetrating the country. See the returns of the sale in Tallahassee; refer to the price of lands in the States; when it sells for *twelve dollars* per acre, *ten* of that is derived from the *improvement*, because land in its vacant state requires that sum to improve it. I do not hesitate to believe that the land in the state in which these settlers found it was not worth more than the sum they were required to pay by this law. It is a sound principle in politics and ethics that he who *benefits the public is entitled to his reward.*" (Italics ours.)

Again, after reviewing the difficulties and dangers overcome by these early settlers, he says:

> "Is it just, sir, that one who has, by improving the country, *increased the value of all the contiguous land, and whose labor alone has given additional value to the spot on which he has located his family*, shall be expelled *without an equivalent* from his home, by affording to the ruthless speculator an opportunity to buy it over him?"

In the same debate Mr. Owen, another member of the House, is reported as follows:

> "He thought it was our true policy to grant to those who settled upon the lands the right of pre-emption. *It was their labor which gave value to the lands; without it they would have had none.* He considered it wise to encourage those who might with propriety be termed the 'pioneers of a more dense population.'" (Italics ours.)

Again, in speaking on the same bill, Mr. White, of Florida, said:

> "If, then, sir, the lands on which these settlers live are worth more at this time, from what is it derived? *Their own labor.* And is it just that the government should appropriate the labors of its own citizens to fill its coffers? Sir, it would be making slaves of the most deserving of our population. If the land is worth a dollar and a quarter or two dollars in the woods, and it costs *ten dollars to clear it*, is it fair or magnanimous to take from the settler, encouraged to locate there by your laws, more than the value of the land in its unimproved condition?" (Italics ours.)

This entire debate is printed in the appendix to this brief, and to this the court is referred for a full statement of the facts and

circumstances existing at the time which moved Congress to enact this legislation. The terms of the act itself, taken in connection with these facts and circumstances, are sufficient to show that Congress, in granting this land to the actual settlers prior to the 1st of January, 1825, for only a nominal consideration of a dollar and a quarter per acre, accepted the labor of the settlers in clearing and improving the land, and the resulting benefits to the public at large, and the increase in the value of the other lands of the government, as *a payment by the settler for the lands so granted.*

Now, it is respectfully submitted, that if a citizen of the United States had at that time made an offer to the government to open up a portion of certain tracts of lands which were of little value in woods, but which when opened would have been worth ten dollars an acre, upon consideration that when same was opened for cultivation he should purchase it for $1.25 per acre, and Congress had accepted the offer regarding the labor of opening the public land, and the benefit to the surrounding land, as a payment of the balance of the market price of the land when improved, no one could have questioned but that this transaction would have given to such purchaser a valid, vested, equitable interest in the land, which could not have been defeated by subsequent acts of the government, or by any subsequent settler upon the land. This is just what the transactions involved in this pre-emption act amounted to. The government accepted the labor and services of the early settler as a part payment for the land, and when the act of 1826 was passed, granting to such settler the right of pre-emption in said land so settled upon and cultivated, at a mere nominal price of one dollar and a quarter per acre, regardless of its then actual value, it gave a vested right or interest in that land to the settler who came within the terms of the act, in consideration of labor and services performed, which could only be defeated or divested by the failure to perform certain *conditions subsequent named in the act,* followed by an *act enforcing the forfeiture* on the part of the grantor—a forfeiture which under the conditions of the case a court of equity would be *most reluctant* to enforce.

The vested character of this pre-emption right was clearly recog-

nized by the contemporaneous authorities construing these acts, and the whole trouble in this case grows out of the fact that the Interior Department, and counsel for the demurrants, are attempting to construe this early pre-emption act, and the rights acquired thereunder, by authorities dealing with *subsequent acts* based upon *entirely different principles,* where the *vesting* of the right was dependent upon the performance of certain *conditions precedent.*

Thus in a communication from the Secretary of the Treasury to the Commissioner of the Land Office, March 13, 1819 (2 P., L. L. I. and O., p. 298), in speaking of the pre-emption rights in Missouri under the acts of 1813 and 1814 (which were similar in terms to the act of 1826), he says:

> "In no case shall the location of New Madrid certificates upon any tract of land to which the right of pre-emption *has been* or *shall be* established, be considered lawful or recognized by the receivers and registers of the then land offices in the Territory of Missouri. . . .
>
> "In every case where any quarter section or fractional section to which the right of pre-emption existed has been sold at public or private sale in consequence of *instructions from the General Land Office, such sale to be considered as null, and the money to be refunded to the purchaser.*" (Italics ours.)

In other words, the Secretary declares that where the right of pre-emption has been given to any tract of land a subsequent sale by the government, and the payment of the money by the purchaser, cannot affect that right, although proof and payment has not been made by the pre-emptor claimant, and that the sale will be considered as null, and the government will return the money upon proof of a pre-emption claim, althought the sale was made under "instructions from the General Land Office." Could there be a stronger recognition of a vested right on the part of the pre-emption claimant?

On August 23, 1830, Attorney-General Berrien gave to the Secretary of the Treasury an opinion defining the pre-emption right as given by the act of 1830, which act was similar in many of its provisions to the act of 1826, though not so broad in its scope, in that it excepted all lands reserved by Congress or the

President, for any use whatever. The *nature* of the right given, however, was the same, relating, as it did, to past settlements. The inquiry which the Attorney-General was called upon to answer was, "Does the act confer upon the pre-emptioner such an *unqualified right* to the land occupied as to preclude the entry and purchase of it by any other person while the act continues in force?" In this opinion (2 P., L. L. I. and O., 61) the Attorney-General says:

> "Here is an *unqualified right of entry* to all persons who had the possession, and who had made the cultivation required by the act, which right of entry, so far as this section provides, is unlimited as to time," &c.

The Attorney-General then reviews the exceptions named in the act (which were not in the act of 1826), and continuing, says:

> "Subject to these exceptions, it is an *unqualified right*, and in its exercise is not restricted as to time, except in the case of lands offered for sale under the proclamation of the President, in regard to which it is limited by the time appointed for the commencement of the sales and in relation to all others by the duration of the act."

The Attorney-General, after a full discussion of the act, then answers the above inquiry in the affirmative, saying, "I incline to think the right of the occupant, if exercised by making proof and payment required at any time *during the continuance of the act, will prevail,*" etc.

In a communication from the Commissioner of the General Land Office to the register and receiver at Mount Salus, Miss., dated February 17, 1831, in discussing the right given by the act of 1830, just mentioned, that officer says:

> "The question, therefore, arose how to admit the private entries of lands which had been offered at public sale prior to the date of the act of May 29, 1830, to proceed as usual, without running the hazard of interfering with persons who, under the strict letter of the law, might have a *vested right to a pre-emption,* but whom we could not compel to come forward with the proof of such claim, within the year." (Italics ours.)

In the same communication that officer said:

> "I would observe that many cases exist where lands have been *sold at private sale,* to which the right of pre-emption has *since been approved and will be sustained under the law.*" (Italics ours.)

It will thus be seen that the vested character of the pre-emption right granted by these early acts was clearly recognized and acted upon by the different officers of the Land Department, in their contemporaneous construction of these acts, and that the Interior Department, in passing upon the Hackley claim, simply did not take the trouble to examine its own decisions on these acts.

This construction of the pre-emption act of April 22, 1826, is not confined to the Executive Department, for we find it affirmed by the highest courts, both State and Federal.

An early and well-considered case upon this subject is that of *Wynn* v. *Morris,* 16 Ark., 414, which was a pre-emption claim by Keziah Taylor to a tract of land in Arkansas under the act of 1830. (4 Stats., 420.)

This act was similar in terms to the act of 1826, except that it was narrower in its scope, in that it required the claimant to be *in possession* on the day of the passage of the act, and excepted from its operation lands *reserved for any purpose,* provisions *not contained* in the act of 1826.

The *nature* of the right granted, however, by the act of 1830 was identical with that of 1826, both being applicable to *past* settlers; therefore, the authorities upon the former, construing like provisions, are equally applicable to the latter.

In *Wynn* v. *Morris, supra,* the lands were not surveyed until *December, 1841,* within one year after survey allowed by the act of 1830, as extended by the act of 1834, viz., on the 9th of December, 1842, Mrs. Taylor appeared in person before the Register and Receiver of the Land Office at Washington, Arkansas, and upon the usual showing of cultivation in 1829, and possession on May 29, 1830, was allowed to enter and pay for land at the minimum price, and obtained the usual receiver's receipt therefor, upon which a patent issued in her name on the 23rd of February, 1844, all of which was allowed to be done, notwithstanding the

fact that prior thereto, viz., on *May 16, 1841*, the tract in controversy had been selected by the duly authorized locating agent for the State of Arkansas as a part of the 500,000 acres granted by Congress for internal improvements by the act approved 4th September, 1841.

After much litigation, a patent was issued to Mrs. Taylor, and Wynn brought suit in State courts of Arkansas against one Morris, the assignee of Mrs. Taylor (see *Wynn* v. *Morris*, 16 Ark., 414), and had as his attorney Gen. Albert Pike, one of the greatest and most celebrated lawyers of his day.

The Supreme Court of Arkansas on appeal found the following facts:

> "In reference to occupancy and possession of the tract of land in controversy, the facts appear to be that about the year 1821 William Hemphill settled on the southwest quarter of section seven, and soon after extended his improvement on to the land in controversy. That in 1824 or 1825 he departed this life, leaving a widow and two children (one of whom died) in the possession of his improvement. His widow, Keziah, now Keziah Taylor, remained there, and, in 1826 or 1827, married Thomas Jacobs, who lived there until his death, in 1828, after which his widow, Keziah, remained there until after the 29th of May, 1830, perhaps until the fall of that year, or until the spring of 1831. Her cultivation of the tract of land in question in 1829—either by herself, or some one for her—and her possession of it on the 29th of May, 1830, may be regarded as fully enough established, her residence all the time being upon section seven.
>
> "In the fall of 1830, or spring of 1831, she clandestinely left the United States, expressing her intention never to return again, and settled in Texas, where she soon after married a man named Taylor.
>
> "It thus appears that from the time of Mrs. Taylor's removal from the United States until her appearance at the Land Office to make her pre-emption claim was a period of twelve years. And there is no evidence that any claim to the land in controversy had been made in her behalf for nearly eleven years. During all this time she had been permanently residing in Texas, having become a *feme covert* there during the first year of her residence." She sold her improvements on the land to one Bales before leaving for Texas.

Upon this state of facts the court delivered its opinion, from which we extract the following:

"It is not at all probable, in point of fact, that Mrs. Taylor intended to sell a pre-emption right to the land in controversy, or that Bales intended or expected to buy such a right. The lands had not then been surveyed by the government, and whether or not they ever would be, was dependent upon the doubtful matter, whether they would be found within the territorial limits of the United States upon the running of the boundary line between this country and Texas, which was not done until some ten years afterwards. Nor had she done any act—nor was it in her power to do any such by reason of the want of the public surveys as a means of identifying her land—indicating an election on her part to accept the gratuity offered her by the government, and thereby change the character of her occupancy from that of a mere squatter to that of lawful possession under color of a *vested legal right.*

"Nor was the sale of her occupancy and improvement, at the time she made it, a sale either of the thing out of which her pre-emption right grew, or in which it lived. That right did not grow out of, or live in, any occupancy of or improvement upon the public lands which existed after the 30th of May, 1830. Occupancy of and improvements upon the public land, either prior to the time when the law of 1830 would operate upon them, or subsequent to the 30th of May, 1830, were equally incapable of springing up, or sustaining a pre-emption right under the law of that year. That right grew out of facts that were as incapable of being transferred to and fixed in a purchaser by sale as yesterday or last week would be. *These facts were a cultivation and possession that were past and gone, not a cultivation and possession now existing.*

* * * * * * *

"But supposing Wynn to be in a condition to contest the validity of Mrs. Taylor's pre-emption right, and the grant thereon, it would seem to be well enough sustained.

"She could not have known with certainty of its existence until the boundary line was run between the United States and Texas, which was not a great while before she appeared at the Land Office to prove it up, although she had been absent so long before.

"Her cultivation in 1829, and possession the 29th June, 1830, seems well enough established; indeed, they were

admitted by Wynn in his correspondence with the Commissioner of the General Land Office, and seem now to be admitted by his counsel. *And her pre-emption right being thus 'covered by the law,' it became a legal right, subject to be defeated only by the failure to perform the conditions annexed to it.* And those which were subsequent were but proof to the satisfaction of the Register and Receiver of the proper land office and payment within the time prescribed by act of Congress. And this having been rendered impossible by reason of the surveys not having been made and the plats returned on the part of the government within that time, the act of Congress of the 14th July, 1832, afforded her relief, and enabled her to reap the benefits of that of 1830, under which her rights had vested, to which the act of 1832 was a supplement. *Lytle* v. *The State of Arkansas,* 7 Eng. Rep., at p. 34; *Gaines and others* v. *Hale* (ante).

"The further supposed condition of continued actual occupancy and possession under the act of 1830 has never been required by the Commissioner of the General Land Office, whose judgment, in the administration of the land laws, is enlightened by the law officers of the government. And in the case of *Lytle* v. *The State* (9 How., U. S. Rep., 314), already cited, which stood on demurrer, the bill contained no such allegation. Whatever evils or hardships may have occasionally resulted to a second settler upon an apparently abandoned occupancy, or to the purchaser of an improvement upon lands to which a pre-emption right had vested, who might occupy and continue to improve the land in the interval between the accrual of the right and its consummation—often protracted to a great length by the tardiness of the public surveys—the courts are not authorized to remedy them by imposing upon the pre-emptor conditions beyond those imposed by the act of Congress under which *his pre-emption right has vested.* Nor are such second settlers or occupiers of improvements—who are no other than trespassers—within the saving influence of equitable doctrines, applicable to those who predicate their rights of occupancy upon law. Some of the evils of the earlier pre-emption laws have been remedied by provisions in later ones, experience having shown such evils, and the wisdom of Congress provided against them for the future; but this can lay no foundation for the courts, *when passing upon rights vested under the earlier laws, whose consummation had been for a series of years prevented by the tardy action of the surveying department, to endeavor to provide any like remedies by*

judicial legislation, especially for such evils as are the natural result of this very tardiness on the part of the government. These earlier laws, like that of 1830, were of short duration, and when a right accrued under any of them it was not possible for the land to which it attached to be kept in a dubious condition as to the intention of the pre-emptor to consummate it or not for an inconvenient time. Under these laws, if he did not make his proof and payment within the short time provided, his right was forfeited. And it is most reasonably to be supposed, that for the advantages that the government proposed to reap from these laws, she was willing to submit to the inconvenience of extending to the pre-emptor the privilege of making his election to consummate his right or abandon it at his pleasure up to the last moment. Hence the only abandonment or forfeiture that was probably contemplated, was that which was evidenced by a failure to make proof and payment within the time prescribed by the law, and the usages in the General Land Office seem to have conformed to this idea. Even in cases where the pre-emptor had equal right, by virtue of cultivation and possession, to several tracts of the public land, he was not held to have abandoned either until he had made his election, although at the last moment.

"The words used in the act in question, 'every settler or occupant of the public lands,' are sufficiently broad to embrace aliens as well as citizens, and, administering it, the Land Department made no discrimination, and even extended it to free negroes, when the laws of the State in which they claimed pre-emption allowed them to buy lands. And hence, although Mrs. Taylor might have been an alien when her pre-emption right was consummated by grant, she had, without the aid of any statute, capacity to take and hold lands until forfeiture in office found. *But when her right in this case vested, she was indisputably a citizen, and the grant would relate to that time.*

"And if, after the vesting of her right, and before it was consummated by grant from the Federal Government, she, by the double operation of her own will and the assent of the Federal Government, had become an alien, that would not have worked a forfeiture of the right *so already vested.* This we understand to be the general principle of law applicable to the point.

"We have been unable to perceive the force of the distinction taken by counsel between a right and a title, as an avoidance of the effect of these principles of law. They are,

perhaps, not entirely convertible terms, because the one savors more of the substance and the other more of form. The right, however, may exist in equity, while the title, when acquired, would be the legal evidence of the right, one when emanating from the government, after various acts following the vesting of the right, and all in consummation of it, as in this case, the issuance of the patent would relate to the *time of the vesting of the right,* as between the government and the grantee; and so, also, doubtless, as between the grantee and others not having intervening rights founded upon law." (Italics ours.)

The doctrine declared in the above case—that the pre-emption act gave to the settler who came within its terms an immediate vested right, which could only be defeated by the failure to perform the conditions subsequent, named in the act itself—has been affirmed by the Supreme Court of the United States in a number of cases.

In the case of *United States* v. *Fitzgerald,* 15 Peters, 418, the Supreme Court of the United States, in a contest between the government and a pre-emption claimant under the act of 1830 (4 Stat., 420), as extended by the act of 1834 (4 Stat., 488), was called upon to consider the character of the right granted by that pre-emption act, which, as above stated, was similar in its essential provisions to the act of 1826.

In that case the Secretary of the Treasury attempted to declare a reservation of the land after the pre-emption right had accrued. The court held:

> "As no reservation or appropriation of the land, made *after the right of the defendants accrued* under the act of June 19, 1834, could defeat that right, it is useless to inquire into the authority by which the Secretary of the Treasury attempted to make the reservation." (Italics ours.)

See *Barnard* v. *Ashley,* 18 How., 43.

In *Lytle* v. *Arkansas,* 9 How., 314, the Supreme Court declared in terms that the pre-emption right given by the act of 1830 was a *vested right* which could not be defeated by subsequent grants or other acts.

In that case a man named Cloyes claimed the right of pre-emption to a certain tract of land in Arkansas under the act of

1830, by virtue of a settlement made prior to 1829. On 15 June, 1832, before Cloyes proved his claim, Congress granted to the State of Arkansas one thousand acres of land, to be located by the Governor, and on March 2, 1833, a location was made, including the land *afterwards* claimed by Cloyes.

The officers of the Land Department refused to recognize the pre-emption right claimed by Cloyes, and patents were issued to the Governor of the State and his assignee, and improvements were made upon the land by their vendees.

A suit was brought by Cloyes to establish his right to the land, and the Supreme Court held that by virtue of his settlement prior to 1830, the act of 1830 gave him a vested right which could not be interfered with by the grant to the State of Arkansas.

In speaking of the claim, the court used the following significant language, which we have already quoted, but which is so applicable it will bear a repetition:

> "The claim of pre-emption is not that shadowy right which by some it is considered to be. Until sanctioned by law it has no existence as a substantive right. But, when covered by law, it becomes a legal right, subject to be defeated only by failure to perform the conditions annexed to it. It is founded upon an enlightened public policy, rendered necessary by the enterprise of our citizens. The adventurous pioneer who is found in advance of our settlements encounters many hardships, and not unfrequently dangers from savage incursions. He is generally poor, and it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him, not to exceed 160 acres. That this is a national feeling is shown by the course of legislation for many years."

In discussing the case further the court said:

> "By the grant to Arkansas, Congress *could not have intended to impair vested rights.* The grant of the thousand acres, and of other tracts, must be so construed as not to interfere with the pre-emption of Cloyes." (Italics ours.)

In the case of *Brown's Lessee* v. *Clements,* 3 How., 666, cited with approval in *Lytle* v. *Arkansas, supra,* the court speaks of a pre-emption act as such an appropriation of land as to remove the

same from the operation of subsequent grants or claims. The court says:

> "The act of the 29th of May, 1830, appropriated the quarter section of land in controversy on which Etheredge was then settled to his claim, under the act, for one year, subject, however, to be defeated by his failure to comply with its provisions."

In *Barnard* v. *Ashley,* 18 How., 43, 45, the Supreme Court, in speaking of the decision in *Lytle* v. *Arkansas, supra,* said the land was decreed to "Cloyes, the claimant, this court holding his claim to the land to have been a legal right *by virtue of the occupancy and cultivation,* subject to be defeated *only* by failure to perform the conditions of making proof and tendering the purchase-money."

See also *Hall* v. *Pipin,* 24 How., 132.
Bryan v. *Forsythe,* 19 How., 334.

These decisions by the highest courts would seem to be conclusive as to the vested character of the right or interest granted by the pre-emption act of April 22, 1826. We will refer to only one other authority construing an analogous act in which the early pre-emption acts are discussed, and which is so directly in point that we ask a careful consideration thereof by the court.

The case to which we refer is *Johnson* v. *United States,* 2 Ct. of Cl. Repts., 391, decided in 1866.

This cause arose under the Oregon Donation act of September 27, 1850 (9 Stat., 496), which act granted actual settlers on the public lands prior to September 1, 1850, a donation of 320 acres to a single man, being based upon the same principle as the early pre-emption acts—namely, a reward for settlement and cultivation.

In July, 1850, the claimant, Johnson, made a settlement at a point on the Columbia river and erected his improvements.

In 1856, before a survey of the land had been made, and before the patent was issued, when the claimant's right, in the language of the court, "rested entirely upon his four years' continued residence and cultivation and previous notification," a detachment of United States troops ejected him from his settlement, and

established thereon a military post. Johnson insisted that he had acquired a vested right to the land by virtue of the Donation Act, and, after many years of litigation, this claim was recognized and confirmed by the decision of the Court of Claims of the United States.

In discussing the nature of the right given by the act, the court held that it was similar in every respect to the right given by the *early pre-emption acts,* and, at page 411, uses the following pertinent language with reference to these early acts:

> "A distinction has been suggested between the case of Fitzgerald and the case at bar. The decision of the Supreme Court related to the act of the 29th of May, 1830 (4 Stats., 420), which was a pre-emption act and exacted money from the settler; whereas, under the Oregon act, no money was exacted, and the grant was termed a donation. But there were several reasons for holding that under the Oregon, or 'Donation act,' the settler acquired *an equitable title by virtue of his four years' residence and cultivation;* and for saying that the decision of the Supreme Court is decisive and obligatory here. In the first place, the payment of money was only *a part of the consideration given by the grantee under the pre-emption acts.* There, as here, he was required to *occupy and cultivate.* There the grant was restricted to even a smaller tract than was here given, and the *policy* and *chief end* of the statute as of this, was to *foster the advance of civilization into the uninhabited and useless portion of the national domain.* The Donation Act was only an advance on the same line of national policy, and the patent which it promised was *not a naked gift,* but a grant upon a *present consideration, received and accepted by the grantor. This consideration was just as valid and binding on the government as the other, for in the eye of the law services are as sufficient a consideration to support a grant as money, or as services and money.*" (Italics ours.)

See also *Lamb* v. *Davenport,* 18 Wall., 307.

The facts of the Johnson case were very similar to the Hackley claim, and the language of court could not have been more applicable if this case had been under consideration. It would seem to be conclusive as to the vested character of the right or equitable title given by the early pre-emption acts.

We have thus far considered only those authorities arising under the act of 1826, or statutes identical in terms or principle. There are other lines of authorities construing acts analogous to these early pre-emption acts, which are instructive, but which cannot be reviewed within the limits of this brief. We refer to acts confirming the rights of settlers upon lands acquired from other governments, the Swamp Land Grants, and acts of a similar character, giving to settlers a preference right in the purchase of lands upon which they had settled, or an equitable interest in or title to the land, subject to confirmation and patent. See, as illustrations, acts of February 21, 1833, 3 Stats., 724; act of May 15, 1820, 3 Stats., 605; act of June 13, 1812, 2 Stats., 748; act of March 23, 1823, 3 Stats., 773.

It has been decided in numerous cases that these acts were grants in *presenti* of an equitable title to, or interest in the land, which could afterwards be perfected into a legal title by necessary proof and patent from the United States.

Morrow v. *Whitney*, 95 U. S., 551.
Bryan v. *Forsyth*, 9 How., 334.
Carondelet v. *St. Louis*, 1 Black, 179.
Glasgow v. *Hortiz*, 1 Black, 595.
Savignac v. *Garrison*, 18 How., 132.

The granting terms in the acts referred to in these cases are the same, or substantially the same, as those in the acts of 1826 and 1813, under which the complainants claim, and the authorities by analogy sustain our contention that the acts of 1826 and 1813 were grants in *presenti* to certain classes of persons named therein of a vested equitable right to, or interest in, the lands settled, inhabited and cultivated by them, as described in the acts. Such acts would be meaningless, however, if the rule of construction followed by the department, of applying to these early acts the authorities construing the modern pre-emption acts, had been adopted by the department or the courts in determining the rights of claimants thereunder.

The view of these statutes taken by the courts may be seen by reference to the case of *Glasgow* v. *Hortiz*, 1 Black, 595.

There the act of June 13, 1812 (2 Stats., 748), entitled, "An

act making further provision for settling claims to land in the Territory of Missouri," was under consideration, and the court said:

"The construction of the act of 1812 has been so often before the courts of Missouri and this court that it would be tedious to refer to the cases. The case of *Guitard* v. *Stoddard,* 16 How., 508, need only be cited, as it contains a review of previous decisions. We there decided 'that the act of 1812 is a present operative grant of all the interest of the United States in the property described in the act'; and that the right of the grantee was not dependent on the *factum* of a survey under the Spanish Government. That the act makes no requisition for a concession, survey or permission to settle, cultivate or possess as a basis of the right, title or claim upon which its confirmatory provisions operate. No board was appointed to receive evidence, or authenticate titles, or adjust contradictory pretensions. All these questions were left to be decided by the judicial tribunals."

So in the case at bar. Congress, in its discretion has seen fit to grant to "any person" who did *in fact* settle and cultivate a tract of land in Florida before January 1, 1825, an equitable interest in such land, and prescribes a simple means by which it could be perfected into a legal title. The courts cannot read new provisions into the act, or raise new conditions to defeat the obvious and beneficent intent of Congress.

In the light of contemporaneous construction of the acts of 1826 and 1813 by the Land Department, of the decisions of the highest courts, both State and Federal, which have been cited, and of authorities construing analogous acts based upon similar principles, it is respectfully submitted that the proposition is conclusively established that the pre-emption act of April 22, 1826, gave to the settlers upon the public lands in the Territory of Florida, who settled upon and cultivated the same prior to the 1st of January, 1825, a vested right of pre-emption in the purchase thereof, or an immediate equitable interest in or title thereto, in consideration for labor and services in opening up the public lands, which right or title related back to the date of settlement, and could only be divested by forfeiture for failure to perform the condition subsequent named in the act; and that

such rights and interests of the early settlers have been uniformly favored and protected by every department of the government.

The Secretary of Interior, in his decision of November 25, 1892, and counsel for the appellees in the court below, have cited and relied upon a number of modern cases, such as *Frisbee* v. *Whitney*, 9 Wall., 187; *Yosemite Valley Case*, 15 Wall., 77; *Shepley* v. *Cowen*, 91 U. S., 330; *Rector* v. *United States*, 92 U. S., 698; *Atherton* v. *Fowler*, 96 U. S., 513; *Moore* v. *Robins*, 96 U. S., 530, and *Buxton* v. *Travers*, 130 U. S., 232. These cases are cited in support of their contention that under the pre-emption law no right or interest can vest until the land has been surveyed, proof made and the purchase-money paid.

With one exception (*Rector* v. *United States*, 92 U. S., 698), all of the cases cited arose under and involved the consideration of the pre-emption act of 1841 (5 Stats., 543), which, as we have seen, was entirely different in terms and in principle from the pre-emption acts passed prior to that date.

The act of 1841 was limited by its terms to *surveyed lands*, and, therefore, no pre-emption claim could be established under that act except to lands which had been surveyed.

The act of 1841 provided in terms that persons who *thereafter* settled, inhabited and improved a tract of land were authorized to enter the same with the Register, thus, by the terms of the act, only giving the right upon the performance of conditions precedent, and it necessarily follows, as was stated by the Supreme Court in the cases cited above, that no right could vest under this act until the conditions precedent had been performed. This would seem too clear for argument.

On the other hand, the act of 1826, under which the complainants claim, was not limited by its terms to surveyed lands, but by its very terms and the facts and circumstances existing at the time necessarily referred to *unsurveyed* lands, and this is clearly shown by the fact that in the act of 1813, made a part of the act of 1826, reference is made to survey lines run *or to be run*.

The act of 1826 did not, like the act of 1841, give the right of pre-emption to some person in the future when certain conditions precedent had been performed, but gave an *immediate*

right of pre-emption to persons who had prior to the date fixed in the act already performed the conditions of settlement and cultivation, and, therefore, vested in the beneficiary of the act an immediate interest in consideration of past settlement and cultivation, subject only to forfeiture for failure to perfect this equitable interest into a legal title in accordance with the terms of the act.

A consideration of these differences in the terms of the different acts is a complete and sufficient answer to the contention of counsel for appellees based upon the case of *Frisbee* v. *Whitney*, and other cases cited *supra*. We admit, once and for all, that neither under the terms of the act of 1841, nor under the authorities construing that act, could any vested right or interest be acquired by the pre-emption claimant until the conditions precedent named in the act had been performed; but we insist, with all earnestness, that claims arising under the act of 1826 cannot be governed by the provisions of the act of 1841, nor can the rights of claimants under the act of 1826 be tested by or governed by authorities construing the act of 1841.

It will be further noticed that in the case of *Frisbee* v. *Whitney*, *supra*, and in many of the other cases cited, the question involved was the right of the *United States* to reserve or dispose of land, as against the pre-emption claimant who had not perfected his claim under the act of 1841; or, in other words, it involved the validity of a pre-emption claim where the conditions of the act of 1841 had not been performed as against the government of the United States itself. The Supreme Court, in *Frisbee* v. *Whitney*, and in *Yosemite Valley* and other cases, held that while this pre-emption right under the act of 1841, based only upon cultivation and settlement, where the other conditions required by the act had not been performed, was not vested as against the government, yet even under this act the cultivation and settlement gave a prior right as against other claimants which the courts would protect and enforce.

In the case now before this court, there is no contest between the government and the Hackley heirs—the government is no longer interested—but it is between private individuals, where prior settlement and cultivation on the part of Hackley is admitted. Even, therefore, if this case be tested by the authorities

construing the act of 1841, against which we most earnestly protest, and for which we insist there is no reason or authority, yet in such a case the claim of the legal representatives of Hackley, based upon a prior settlement and cultivation, should be protected against subsequent claims of speculators, who have come in to take this land when it became valuable, and when settlement was no longer accompanied by danger or difficulty.

We do not deem a further examination of the authorities above referred to necessary at this point, with the exception of the case of *Rector* v. *United States,* in which claims under the acts of April 12, 1814, and May 29, 1830 (which were similar in their general provisions to the act of 1826), are construed.

These cases, commonly known as the *"Hot Springs Cases,"* involved a controversy between pre-emption claimants and the United States Government. The government had undertaken, by congressional act, to reserve several sections of land, embracing the Hot Springs, Arkansas, from disposition, and persons who had settled on this land undertook to assert their claims against the United States. As we have seen, this fact, in itself, is sufficient to distinguish the cases from that now under consideration, for, as the courts have universally held, a claim may be good as against individuals which may not be good against the *United States.*

Frisbee v. *Whitney, supra.*

However, the court itself has distinguished this group of cases from the authorities which we have cited in support of our contention, and has based its decision upon the peculiar facts of each case.

Mr. Justice Bradley rejects the Hale claim, (1) on the ground that the Indian title had not been extinguished (page 703), and (2) upon the conclusive finding (page 705) that the settlement upon which the claim was based did not *come within the act of* 1814, under which the claim was initiated.

The Gaines claim (page 705) was rejected upon the ground (page 706) that at the time the land was reserved by act of Congress there was no act in force under which the pre-emption claim could have been initiated; that the act of 1830 expired

at the end of one year, and before it was renewed in 1832, an act of Congress had been passed reserving this land from sale or entry. The court refuses to decide whether, under the act of 1830, a vested right could be set up against the Government before entry and location, but decides that this claim would be invalid, "even if a vested right could be set up against the government before entry and location." The Rector claim was rejected upon its peculiar facts, which need not be noticed, as it involved a claim under New Madrid script.

We submit that this brief review of the cases relied upon to meet our contention with respect to the act of 1826 is sufficient to show that these authorities can have no bearing upon the claim now before this court. On the other hand, it is submitted that the act of 1826, as construed by contemporaneous authorities, executive and judicial, gave to Robert J. Hackley and his legal representatives, by virtue of his settlement and cultivation prior to the 1st of January, 1825, a vested right of pre-emption in the purchase of said tract of land, which, under the terms of the act and under the construction given by the authorities cited by us, was a vested equitable title in, or to, said tract of land as of the date of the passage of the act, which right or title related back to the date of the settlement, and could only be forfeited by failure to comply with the conditions subsequently named in the act by which this equitable title was to be perfected into a legal title.

We shall show hereafter that Hackley and his legal representatives have fully complied with the conditions subsequent named, and that the United States has never attempted to enforce any forfeiture.

With our position, and the principal authorities in support thereof, thus before the court, let us next consider in their order the several grounds upon which the demurrants contend that Hackley, or his legal representatives, never acquired any right to said land.

III. Does the Act of March 3, 1807, Affect the Rights of the Complainants in these Causes?

The specification of demurrer based upon the act of March 3, 1807, is set out as section 1 of the first demurrer (p. 79), as follows:

> "The alleged settlement and cultivation by Robert J. Hackley of the lands involved, in 1823 and 1824, did not confer upon or vest in the said Robert J. Hackley any right or lawful claim to any part of the lands described in complainants' bill, *because such entry upon and possession of said land was without authority of law, and in direct violation of the acts of Congress* in force in the State of Florida at that time." (Acts of March 3, 1807, 2 Stats., 445; Act of March 30, 1822, 2 Stats, 645.) (*Italics ours.*)

The act of March 30, 1822, simply makes the act of March 3, 1807, applicable to the Territory of Florida.

This specification comprehends that contained in the sixth section of the joint demurrer (page 80) in the following language:

> "It does not appear from the allegations of the complainants' bills that Robert J. Hackley was ever in *lawful possession or occupancy* of the said lands described in said bill, or any part thereof."

The complainants claim under the act of April 22, 1826. That act does not require *"lawful"* possession or occupancy, but simply *"actual* settlement," etc. Upon what principle, therefore, can it be contended that the complainants shall allege or establish "lawful possession or occupancy" ? In *Newhall* v. *Sanger,* 92 U. S., 765, the Supreme Court said, in speaking of another statute:

> "This section expressly excludes from pre-emption and sale all lands claimed under any foreign grant or title. It is said that this means 'lawfully' claimed; but there is no authority to import a word into a statute in order to change its meaning."

Glasgow v. *Hortiz,* 1 Black, 595.

So in this case the court cannot read into the act conditions which it did not contain, so as to change its meaning, especially when, as we shall show hereafter, the language used was employed with special reference to the facts and circumstances existing at the time.

In the consideration of the ground of demurrer, section 1, as above set forth, it becomes necessary, at the outset, to determine the scope and intention of the act of 1807, and whether or not the same affects the rights of the complainants in this cause. Section 1 of this act contains the following provisions:

> "That if any person or persons shall, after the passing of this act, take possession of or make a settlement on any lands ceded or secured to the United States by any treaty made with a foreign nation or by a cession from any State to the United States, which lands shall not have been previously sold, ceded or leased by the United States, or the claims to which lands by such person or persons shall not have been previously *recognized* or *confirmed* by the United States; or, if any person or persons shall cause said lands to be thus occupied, taken possession of or settled, or shall survey, or attempt to survey, or cause to be surveyed any such lands, or designate any boundaries thereon by marking trees or otherwise, until thereto duly authorized by law, such offender or offenders *shall forfeit all his or their right, title or claim, if any he has, or they have, of whatsoever nature or kind, the same shall or may be to the lands aforesaid,"* etc.
>
> . . . "And it shall moreover be *lawful* for the President of the United States to direct the marshal, or officer acting as marshal, in the manner hereinafter directed; and also to take such other measures and employ such military force as he may judge necessary and proper to remove from lands ceded or secured to the United States by treaty or cession as aforesaid, any person or persons who shall hereafter take possession of the same, or make, or attempt to make, a settlement thereon until thereunto authorized by law. And every right, title or claim forfeited under this act shall be taken and deemed to be vested in the United States without any other or further proceedings." (Italics ours.)

The second section provides that actual settlers who had made settlements before the passage of the act might remain on the public land as tenants at will of the United States, upon terms

to be fixed by the Secretary of the Treasury, with the approbation of the President, and upon condition that they would whenever the tract of land might be sold or ceded by the United States, or whenever the United States might require them to do so, give quiet possession of such tract or tracts of land to the purchaser or purchasers, or remove altogether from the land, as the case may be. This section also provided that such settlers should, upon being required so to do, sign a declaration stating that they made no claim to the land, and did not occupy the same by virtue of any claim or pretended claim, *derived, or pretended to be derived, from any other person or persons.*

The fourth section provides "that it shall be *lawful,* after the first day of January next, for the marshal, or proper officer acting as marshal, under such instructions as may for that purpose be given by the President of the United States, to remove from the land aforesaid any and every person who may be found on the same, and who shall not have obtained permission to remain thereon as aforesaid," and providing for three months' notice to such persons that they would be required to remove from the lands, and penalties for their refusal to remove after such notice.

When this act is examined in the light of the conditions existing at the time of its passage, and the policy of the government at that time with respect to the disposition of the public lands, and contemporaneous authorities, it becomes perfectly clear that it was not intended to affect persons who went upon the public lands and made *bona fide* settlement for the purpose of securing a home, and who *did not claim any legal right to the land so settled upon until such right should be conferred by Congress.* It will be noticed that the first section does not make such settlers upon public lands *wrong-doers* in the real sense of that term, but simply provides that they shall *forfeit any right, title or claim* which they may have to the lands settled upon, and that such forfeited rights shall *vest in the United States.* It should further be noticed that it does not *require* the President of the United States to remove such persons from the public lands, but declares that it shall be "lawful" for the President to remove these settlers; and the fourth section provides that it shall be "lawful" for the marshal, under instructions from the President, to remove per-

sons who have settled upon the public lands contrary to the provisions of the act. It was, therefore, left to the *discretion* of the President whether he would or would not remove such settlers, and an examination of the language of the act and its provisions, as a whole, shows clearly that the sole purpose and intent of the statute was to retain in the United States complete title to the public lands until Congress, in which was vested by the constitution the sole right to dispose of such lands, should see fit to make disposition of the same.

Early in the century numerous claims were made to large portions of the public domain by persons claiming, under alleged grants from various sources. Some of these claims were under alleged grants from the original thirteen States—a peculiarly troublesome class being the "Georgia titles," in the Yazoo territory, as to which there was a long controversy between the United States Government and the State of Georgia and its grantees. Others were under alleged grants from foreign governments, such as "French grants" in the Louisiana Territory and "Spanish grants" in Florida (Donaldson Pub. Domain, *passim*). These claimants would go upon the public lands, locate their alleged claims by survey or otherwise, and make sales to settlers, with resulting difficulties to the United States Government, and hardships to those who had purchased lands under fictitious titles. Some of these claims were valid, others were not. It was important, therefore, for the protection of the interest of *bona fide* claimants, and in order to avoid trouble with others, that no settlements should be made under these alleged grants, or claims located, until such claims could be passed upon by the government, and the rights of all parties adjusted. This was essential in order to keep the disposition of the public lands under control of Congress, where the Constitution had put it.

As early, therefore, as 1802 Congress passed an act prohibiting settlements upon the public lands in the Louisiana Territory, and the act of 1807 was but an extension of the same prohibition to other public lands to prevent the location of fraudulent claims then so prevalent.

It was with these claims in view that Congress declared that no settlement or survey should be made until the claim was "recog-

nized" or "confirmed"; that the "offender" should "forfeit" all his *right, title* or *claim,* and that the same should be deemed to be *"vested in the United States,"* etc., thus forever ending his alleged claim. Neither the reason of the statute nor its language was applicable to the *bona fide* settler, who went upon the public lands for the purpose of establishing a home, but claimed no title until the same should be conferred upon him according to law. He was not an "offender," but belonged to a class which it has been the policy of every department of government to encourage and protect. He could not "forfeit" his claim or title, because he made no claim, and acquired no title, until his settlement had been "covered by law." (*Lytle* v. *Arkansas*, 9 How., 314.)

It may be further noted that there is a rule of construction so elementary that the citation of authority in its support is unnecessary, that where there are *two statutes* bearing upon the same subject, and one does not in terms repeal the other, they should, if possible, be so construed as to give effect to both, and if they cannot be reconciled, the last act will prevail.

Between 1807 and 1841 there were fifteen pre-emption acts passed for the benefit of persons who had settled on the public lands ahead of surveys while the act of 1807 was in force. The construction of the act of 1807, for which we contend, does not bring that act into conflict with the subsequent pre-emption acts referred to, while the construction given the act of 1807 by the Interior Department and the demurrants would be in effect to nullify these pre-emption acts. The courts will not adopt such a construction, especially when the historical facts and circumstances, as well as the language of the act itself, show that the act of 1807 was not intended to affect *bona fide* settlers, who made no claim to the lands except under the laws of the United States, but was only intended, as its terms indicate, to apply to persons claiming under alleged grants or authority from other sources. (*Glasgow* v. *Hortiz*, 1 Black, 595.) If, however, the construction of the department were adopted, the pre-emption acts being subsequent in date, would, of course, prevail, and the act of 1807 could not be construed as affecting the rights of persons covered by these acts.

We are not, however, dependent alone upon these general rules

of construction and the terms of the act, but have the contemporaneous construction of the different departments of government.

It is settled law that in construction of statutes the courts will give great, and even controlling weight, to the contemporaneous construction of executive officers.

In *United States* v. *Philbrick,* 120 U. S., 52, 59, the rule is stated as follows:

> "A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight, and since it is not clear that that construction was erroneous, it ought not to be overturned."
>
> *Hahn* v. *United States,* 107 U. S., 405.
> *Brown* v. *United States,* 113 U. S., 571.

In *United States* v. *Johnston,* 124 U. S., the same court speaks of this principle as "the rule often announced by this court that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

> *Edwards* v. *Darby,* 12 Wheat, 206.
> *United States* v. *Moore,* 95 U. S., 760.

On October 25, 1808, a little more than a year after the passage of the act of 1807, the Secretary of the Treasury, who then had charge of the public lands, wrote to Thomas Freeman, deputy surveyor of the United States for the Missouri Territory, construing the purpose of the act of 1807 as to settlers upon the public lands in that territory which had not been surveyed. (2 Pub. Land Laws, Insts. and Orders, 272.) After stating the terms of the act of 1807, and discussing the subject at some length, the Secretary says:

> "You will easily perceive that the great object of the President is to discriminate between settlers who lay no claim to the land, *and will either become purchasers* or quietly submit to the laws, and those who under pretense of *pretended titles* intend either forcibly to occupy the lands

> or to *extort money from ignorant settlers.* Against the last description the President intends to cause the law to be rigorously carried into effect, both by prosecuting for the penalties and removing them by force." (Italics ours.)

Again, on March 9, 1830, in the instructions from the Commissioner of the Land Office to the receiver at Huntsville, Ala., 2 P., L. L. I. and O., 422, the Commissioner discusses at length the provisions and application of the act of 1807. Among other things he says:

> "In now enforcing the provisions of the act of 1807, it is not the intention of the President to disturb those settlers who may occupy lands formerly purchased from, but subsequently relinquished or forfeited by them to the United States, or those persons who *lay no claim to the lands they occupy, and who intend to become the purchasers of them, or submit quietly to the laws and yield possession whenever required by the proper authority;* but understanding that settlements have been or will be made by persons who intend to hold or claim possession of the lands under color of *alleged grants or title from the State of Georgia,* and against whom it is intended to have the provisions of the law carried into rigorous effect, he has decided upon the course now directed to be pursued, in order that the settlers, who will sign the declaration before referred to, may obtain the means of securing themselves against the effects consequent upon the enforcement of the laws respecting unauthorized settlements upon public lands." (Italics ours.)

In these two cases, and others which might be cited if necessary, we have the positive construction of the Executive Department that this act of 1807 was not to be applied to *bona fide* settlers, but to claimants under alleged grants, and titles which the United States Government had not recognized or confirmed.

We appreciate the rule that a court will not be governed by the debates pending the passage of an act in its effort to determine the intention of the legislative branch of the government in its construction thereof, but such debates may frequently aid the court by placing it in possession of contemporaneous facts and conditions existing and under consideration of the legislative body when the act was passed.

In this view, and because of the great ability of Mr. Joseph M. White, delegate from Florida, patron of the bill, and one of the

most eminent land lawyers of his day, we submit, for the consideration of the court, extracts from his remarks upon the pending bill, which became the Florida pre-emption law of 1826, under which complainants claim, and the bearing thereon of the act of 1807, now under consideration. Nor can our contention be more aptly expressed than by the language of Mr. White.

In the *Congressional Debates for* 1825–'26, Vol. 2, Part I., pp. 1422 to 1436, inclusive, will be found the debates upon the act of April 22, 1826.* On February 21, 1826, when the bill was under consideration in the House, Mr. White spoke at length, explaining its purposes and the necessity for its passage. At page 1423 he says:

> "Previously to making a particular reference to those laws, it might remove some obscurity, and obviate some objection, to notice a misapprehension of many gentlemen in regard to settlements upon the public lands.
>
> "It has been alleged that the existing laws forbid settlements upon the public lands, and denounce heavy penalties against all such intruders who were located there without authority, and some called them squatters, which, so far as it is intended as either descriptive or derogatory, was entirely unjustifiable. These inhabitants are small planters, whose lands in the old States have been exhausted by cultivation, and who, animated with the laudable desire to improve their condition and that of their rising families, have encountered all the hardships of penetrating to the borders of the country, disregarding the difficulties of the journey, and unappalled either by the labors of the forest or the enemy in its bosom. Any imputation upon their motives, or question of their right, would be the strongest censure upon our forefathers, who settled this continent influenced by these same praiseworthy considerations. A more respectable population is not to be found in any of the States. If, however, sir, there was a law of the United States interdicting settlements upon the public lands, I could plead as an excuse for that the uniform legislation of Congress regarding its violators, and quote the old maxim, '*communis error facit jus.*' He was fortunately, however, not reduced to such an alternative. The law does not prohibit such settlements, and he would show that the act of 1807, which was considered the basis of such exclusion, did not embrace this class of settlers;

* These debates, so far as applicable, are printed as an Appendix to brief.

and if it had, the law was practically repealed. That act, which is entitled an act 'To prevent intrusions upon the public lands,' provides that if any one shall take possession of, or attempt to survey, lands ceded to the United States, he shall forfeit his claim, and the President may remove him by force. This law was passed not long after the cession of Louisiana to the United States, *and its evident object was to prevent surveys of large claims, the validity of which were doubted, and to prohibit those having unlocated, floating permits from surveying and settling upon the best lands of that rich territory;* and thus they employed the phraseology 'forfeit his claim.' The government were desirous of prohibiting by force, if necessary, the location of these *floating and fraudulent claims,* that the occupancy of them after the change might not be pleaded as a prescriptive right. *It never was and never could be the intention of that law, or any other, of the United States, to prohibit settlements upon the public lands.* (Italics ours.)

On February 22, 1826, the bill being again under discussion, Mr. White, in speaking in favor of the same, said (p. 1433):

"The inhabitants whose rights were intended to be secured by the passage of this bill were not trespassers. The act of 1807, entitled 'An act to prevent intrusion upon the public lands,' was passed shortly after Louisiana was surrendered to the United States. There was at that time numerous unlocated claims derived from the Spanish and French governments, founded on permits, requests and floating concessions. *That act was intended to prevent the location and survey of those incomplete titles,* and at the same time to authorize the President of the United States to preserve by force, if necessary, not only the domain as this government acquired it in the treaty with France, but also to invest him with discretionary power to prevent these locations of claims, many of which were considered invalid, and in the hands of those who did not intend to become citizens of the United States, the pretext for locating which might *have led to serious disturbances in the condition that the country was in at that time. It never was either the intention or policy of the government of the United States to prohibit settlements upon their vacant lands. On the contrary, they have encouraged it by a long-continued system of legislation, both before and after the act to which alone the gentleman must refer in pronouncing them trespassers."* (Italics ours.)

At the conclusion of this speech the question was taken and the bill was passed without a dissenting vote, so far as the record shows, the House thus adopting and approving the grounds urged by the speaker in its favor.

In the case of *Wynne* v. *Morris*, 16 Ark., 414, 424, 434, the Supreme Court of Arkansas has declared, in effect, that the act of 1830, which was not so broad in its provisions as the act of 1826, gave the pre-emption right to settlers upon the unsurveyed public lands who came within its provisions, notwithstanding the act of 1807, or any other act prohibiting the settlement upon the public lands. In that case Mrs. Taylor, who claimed the pre-emption right, had gone upon the public lands long before they had been surveyed, before the act of 1830 was passed. Ten years afterwards, although she had removed from the United States, she returned and claimed her pre-emption right, and the Supreme Court held that the right became vested under the act of 1830, although the settlement had been made before the survey of the lands. At the time the settlement by Mrs. Taylor was made, the act of 1802, *expressly prohibiting settlement upon public lands in Louisiana Territory*, of which Arkansas was a part, was in force, and the act of 1807 *was in force as regards all the public lands of the United States.*

See also *Lytle* v. *Arkansas*, 9 How., 314.

In the light of these authorities, showing the contemporaneous construction of the act of 1807, it is submitted that this act never had any reference to *bona fide* settlers who established their homes upon the public lands with a view to acquiring title from the United States by purchase or under future pre-emption acts, not with intent to violate the law or to claim under some *fictitious or unlawful title;* that if this act ever applied to such settlers, which the authorities clearly show it did not, yet the act of 1826, under which the complainants claim, being of a later date than the act of 1807, nullified the act of 1807 *as to settlers upon the lands in Florida*, and conferred the pre-emption right upon all persons who had *actually* made such settlements in said Territory prior to January 1, 1825.

See, in this connection, *Glasgow* v. *Hortiz*, 1 Black, 595, and cases cited.

IV. The Contention of the Demurrants, that Hackley Acquired no Pre-emption Right by Virtue of his Settlement and Cultivation in 1823–'24, Because the Act of April 22, 1826, was not Retroactive, and did not Apply to Settlers upon the Unsurveyed Public Lands.

The specification of demurrer stating this position is found in section 2 of the joint demurrer (page 79), as follows:

> "The act of April 22, 1826, giving the right of pre-emption to settlers upon lands in Florida, pursuant to the terms and provisions of the act of February 5, 1813, did not and could not have a retroactive effect upon the unlawful possession of the unsurveyed lands described in the complainants' bills by Robert J. Hackley, because the said acts referred to surveyed lands of the government, and were not intended to confer pre-emption rights in unsurveyed government lands."

We have already discussed the question of alleged unlawful possession at length in connection with the act of 1807.

It may be further noted that the act of 1826 did *not require* that Hackley should be in *possession* at the time the act was passed, *or on the 1st of January*, 1826, but simply required that he should have in fact "inhabited and cultivated" said tract of land *prior to January* 1, 1825. The courts cannot read into the act conditions which it does not contain.

Newhall v. *Sanger*, 92 U. S., 765.
Glasgow v. *Hortiz*, 1 Black, 595.

The specification of demurrer raises two questions: First, was the act intended to be retroactive, so as to operate upon settlements made in 1823–'24; and, second, did the act of April 22, 1826, apply to settlements upon the unsurveyed public lands?

It would seem to be too plain for argument that the act of April 22, 1826, was *wholly* retroactive in its character and effect. It gave no right to persons who made settlement upon the public land *subsequent* to its enactment, or subsequent to the *1st of January*, 1825, but provided "that every person, or the legal

representative of any person, who . . . *did on or before the first day of January, in the year one thousand, eight hundred and twenty-five, actually* inhabit and cultivate a tract of land situated in the Territory of Florida, . . . shall be entitled to the right of pre-emption in the purchase thereof," etc.

Under the terms of the act, therefore, only persons who had made settlement and cultivation *prior to the first of January,* 1825, which date was fifteen months *before* the passage of the act, could derive any benefits from its enactment. The act only applied to *past settlements;* was, of course, purely retroactive in its effect, and, as we have seen, Hackley coming distinctly within its express terms, and within its intent, it must necessarily operate upon his settlement, as well as other settlements made prior to the 1st of January, 1825, unless excepted by the terms of the act itself.

By reference to the contemporaneous authorities of both the executive and judicial departments of government, it will be found that their construction of these early pre-emption acts was in accord with the above suggestions. The proposition would seem to be so plain, however, that we will not weary the court with a review of these authorities.

This act provided that the persons coming within its terms "shall be entitled to the right of pre-emption in the purchase thereof, under the same terms, restrictions, conditions, provisions and regulations in every respect as are directed by the act" of February 5, 1813. The last-named act, therefore, became incorporated into the act of 1826, and must be read as a part of it.

The first section provides that every person, &c., who actually inhabited, &c., a tract of land in the Illinois Territory, which tract is not rightfully claimed by any other person, &c., shall be entitled to a preference in becoming the purchaser from the United States of such tract of land at private sale, &c., *"Provided,* That no more than one-quarter section of land shall be sold to any one individual in virtue of this act; and the same shall be bounded by the sectional and divisional lines *run or to be run* under the direction of the surveyor general," &c.

It will thus be seen that the act expressly relates to unsurveyed as well as to surveyed land, otherwise the expression "lines *run*

or to be run" would be meaningless. This is certainly one of the "restrictions, conditions, provisions and regulations" of the act of 1813 which in express terms was to apply to Florida under the act of 1826.

But suppose the act itself contained no such provision, and no reference to surveyed or unsurveyed land. Settlements upon unsurveyed lands are not excluded, but, to the contrary, the act says. "*Every* person, or the legal representatives of *any* person, who . . . did . . . actually inhabit and cultivate a tract of land in the Territory of Florida," etc. Is there anything in this language to exclude any class of lands? To the contrary, could it be broader and more comprehensive? When we add to this the provision that the claims are to be bounded by lines run or "to be run," further discussion of the subject would seem to be idle. The courts cannot make exceptions which the Legislature has not seen fit to insert in the act.

> See *French* v. *Spencer,* 21 How., 228.
> *Yturbide* v. *U. S.,* 22 How., 290.

In view of the fact, however, that demurrants lay great stress upon the point that this land was unsurveyed at the time of Hackley's settlement, and that the Interior Department in the decision of Secretary Noble makes this fact the basis for a decision against the Hackley heirs, we deem it necessary to examine this question with some care, notwithstanding the plain provision of the act embracing every tract of land in the Territory of Florida.

It is submitted that an examination of these early pre-emption acts, including the act of 1826, and the facts and circumstances surrounding these enactments, will show that they applied, almost exclusively, to settlements upon unsurveyed public lands, that is, settlements which had been made ahead of surveys. This is peculiarly true of the settlements in the Territory of Florida.

The record shows that on March 3, 1823, Congress passed an act authorizing the President to establish a land office in each of the districts of East and West Florida, *as soon as, in the opinion of the President, there was a sufficient quantity of public land surveyed* in either of said districts to authorize the opening

of one or both of said land offices. The record further shows that the land office for the eastern district, in which the land in question was located, was not opened until 1828, showing that but little land had been surveyed in this district up to that date. The Indians were not removed from this section of Florida until 1823 and 1824. As none of the lands were, or could have been, surveyed until the Indians were removed, it follows that no surveys were made in this district before January 1, 1825; yet the act gives the right of pre-emption to any person who had settled upon "any tract of land" in the Territory of Florida. It must necessarily have referred to unsurveyed lands, otherwise it was a nullity.

In the debates upon this act, Mr. Vinton, of Ohio, the only person who spoke against its passage, declared his opposition to pre-emption acts of *any character,* and urged as one of the chief grounds for this opposition that it "retarded the sales of lands and *prevented further surveys.*" Again he says:

> "Congress are necessarily ignorant of what is taking place in that part of the public lands which lie *beyond the portion surveyed.* They do not know how many persons are engaged in seizing on the public property, and when they pass a bill like that before them, they continue ignorant of the magnitude of the *grant they have made,* until they find some of its effects interfering with the subsequent movements of the government." (Italics ours.)

Here we have a positive declaration on the part of a member of Congress, in the debate upon the act of 1826, that the pre-emption act under consideration would interfere with the surveys of the public lands, and urging as a ground against its enactment that Congress was not familiar with the conditions existing on the unsurveyed public lands, or how many pre-emption claims there might be on these lands, thus showing the existing conditions which Congress had in view.

We find this view confirmed by contemporaneous construction of these acts by the Executive Department.

On August 28, 1819, the Attorney-General was called upon for an opinion as to the effect of the act of April 12, 1814, which was identical in terms with the act of April 22, 1826, and applied to the Territory of Missouri. On April 12, 1814, Congress had

passed an act directing that the President have surveyed two million acres of land in the Territory of Missouri, which should be reserved, and set apart for military bounties. Before all of this land had been surveyed the pre-emption act of April 12, 1814, was passed. When the lands were surveyed, a question arose as to the priority of right of the early settlers upon the *unsurveyed lands,* and the beneficiaries of the military bounties. In discussing the subject, the Attorney-General says (2 P. L. L. I. & O., 147):

> "From the general language of this act the right of pre-emption *runs through the whole territory, except where the tract for which the settler contends is rightfully claimed by any other person. No such claim can,* I conceive, exist as to lands *which were vacant and unappropriated at the time of the settlement.* The military bounty lands are set apart and reserved from the time of the survey. My opinion, therefore, is that all settlers upon these lands *prior to the surveys are entitled to the right of pre-emption under the act of April* 12, 1814." (Italics ours.)

In a communication from the Commissioner of the Land Office to the Register and Receiver, February 25, 1823 (2 P. L. L. I. & O., 364), the Commissioner discusses the right of settlers upon unsurveyed public lands in the Lawrence County District, under the acts of 1813 and 1814, which were identical in terms with the act of 1826, though applicable to different territory. He says:

> "The law required these pre-emption claims to be made known before the *patents were issued,* in order that such claims might not be disturbed by the bounty lands. It is understood that all who claim pre-emption rights within the district, of land *actually surveyed for military purposes,* did make known their claims, as required, but that others who occupied *parts not surveyed,* failed to do so. . . . But where *surveys had not been executed* it would be impossible for settlers to identify their claims, so as to afford notice to the General Land Office of their particular tracts *after they had been surveyed.* Until the surveys were executed it was utterly impossible to do this, and without this identity, making known the claim was in itself perfectly useless. The law requires nothing useless; nothing impossible." (Italics ours.)

It is useless to cite other instances of the construction by the Executive Department that these laws applied peculiarly to persons on the unsurveyed public lands. We find, however, that Congress has, by express enactment, declared this to be true.

We have seen that the act of 1830 (4 Stats., 420) was similar in purpose and character to the act of 1826, though the former act was much narrower in scope than the latter, in that it contained a number of restrictions not in the act of 1826. The principal of these were:

(1) The claimant under the act of 1830 was required to be *in possession* at the date of the act. The act of 1826 contained *no such requirement.*

(2) The act of 1830 excepted from the operation of the act all *lands reserved* for any purpose whatever. The act of 1826 by reference to the act of 1813 only excepted "lands reserved from sale by *former acts*, or lands which have been directed to be sold in town lots or out lots."

(3) The act of 1830 limited the time within which the right of pre-emption therein given could be perfected *to one year;* while the act of 1826 was *unlimited as to time.*

The act of 1830, however, contained no reference to surveyed or unsurveyed lands, while the act of 1826, by reference to the act of 1813, referred in terms to lines "now or *to be run.*"

Yet when the act of 1830 had expired by its limitation after one year, it was found that a number of persons entitled to the right of pre-emption thereunder had, for various reasons, been unable to perfect their rights. By act passed July 14, 1832 (4 Stats., 603), therefore, the act of 1830 was revived and extended, and was again extended in 1834. The act of 1832 contains the following significant language:

> "That all occupants and settlers upon the public lands of the United States, who are entitled to a pre-emption according to the provisions of the act of Congress approved the 29th day of May, 1830, and who have not been, or shall not be enabled to *make proof* and *enter* the same within the time limited in said act, *in consequence of the public surveys not having been made and returned,* . . . shall be permitted to enter said lands upon the same conditions in every respect," etc.

Here is a declaration by Congress that the act of 1830 (which made no reference to unsurveyed lands) did apply to settlers upon unsurveyed public lands, and because of their inability to perfect their rights by proof and entry until the surveys were made, the operation of the act of 1830 was extended not only in 1832, but several times thereafter, in order to enable them to do so.

The same construction has been given to these acts by the courts.

In *Wynne* v. *Morris*, 16 Ark., 414, as we have already seen, Mrs. Taylor's settlement was prior to 1830; that in that year she left the country and remained away until 1841, and the lands which she claimed, by virtue of her settlement before 1830, were not surveyed *until 1841;* yet the court held that she was entitled to the right of pre-emption, although the lands were not surveyed until *twelve years after* the termination of the settlement upon which this right was based.

In *Lytle* v. *Arkansas*, 9 How., 334, the settlement of Cloyes was made prior to May 29, 1830, and his proof of settlement was made on May 20, 1831; yet the opinion states that the lands were not surveyed until *December, 1833*, and the Supreme Court declared that Cloyes was entitled to pre-emption in the purchase of this land, and sustained his claim against the claim of the State of Arkansas.

In the light of the terms of the act itself, the historical facts and circumstances, showing that practically all of these pre-emption claimants were settlers upon the unsurveyed public lands, and the authorities above cited, it would seem that the fact that the act of 1826, embracing *any tract of land* in the Territory of Florida (passed at a time when the Indians had just been removed, and before surveys could have been made) covered settlements upon the unsurveyed public lands, is beyond controversy, and if any doubt upon the subject could remain, it would be removed by the terms of the act of 1813, incorporated into the act of 1826, referring to the lines "to be run." The act of September 5, 1841, giving the right of pre-emption to future settlers upon the public lands, and establishing the general pre-emption

system, was the *first pre-emption act* which ever limited the pre-emption right to lands which had *been surveyed.*

Counsel for the demurrants, and the Interior Department, in its decision holding that this act did not relate to settlements upon unsurveyed public lands, have based their contention upon the language of Mr. Justice Miller, in *Atherton* v. *Fowler,* 96 U. S., 513, which is as follows:

> "In the early stages of our land system, no right or interest could be secured by the individual, in any public land until it had been surveyed into local sub-divisions. Nor after this had been done was it subject to sale until by proclamation of the President it was brought into the market. . . . It often occurred that emigration in advance of the readiness of the public lands for these sales had caused hundreds and thousands to settle on them, and when they came to be sold at public sale their value, enhanced by the houses, fences and other improvements of the settler, placed them beyond his reach, and they fell into the hands of heartless speculators. To remedy this state of things, the pre-emption system was established. This at first was only applicable to lands which had been surveyed, but gradually this was changed, until in 1862 pre-emptions were allowed, under proper restrictions, on unsurveyed lands, as well as those surveyed."

This language was used in a case deciding a pre-emption claim under the act of 1841, which, as we have already shown, was entirely different in theory and intent from the act of 1826, and other early pre-emption acts. In the paragraph quoted the learned Justice was simply giving a *resume* of the historical facts relative to the disposition of the public lands, which was in no way necessary to the decision, involved no exercise of judgment, and would be binding upon no one, if, when tested by the records and authorities, it were found to be historically inaccurate. When examined in the light of the point he was considering, however, it will be found to be a correct and accurate statement of the historical facts. He speaks of our "land system," and declares that in its earlier stages no rights were acquired until the land was surveyed. This is correct as to the "land system," which, as we have seen, from the beginning of the government to 1841, was a system of selling the lands at public auction, and under

this system no rights were acquired by the purchaser, and no sales made, until the lands were surveyed. He makes no reference to the *exceptions* from the general land system during this era, and no such reference is necessary for the purposes of that opinion. It is a fact, however, of common knowledge that numerous special grants were made during this era of lands which had not been surveyed, and that, as we have seen, some sixteen special pre-emption acts were passed, which were exceptions from the general system then prevailing, which acts applied especially to settlers upon unsurveyed public lands. This general language, referring only to the general land system, cannot be construed to cover exceptions from that system, either special grants or pre-emption acts. Such a construction would make the Judge guilty of an obvious inaccuracy of statement, and would attribute to him a statement in direct conflict with the authorities—executive, legislative and judicial—above cited, including the decision the case of *Lytle* v. *Arkansas,* by the same court.

Again he says, after reviewing the circumstances which led to the establishment of the pre-emption system:

> "This (the pre-emption system) at first was only applicable to lands which had been surveyed."

This statement is entirely correct, for the *pre-emption system* was not established until 1841. The early pre-emption acts which were exceptions from the system then prevailing, established no system, but were simply relief acts for the benefit of a named class of persons. The act of 1841 established the pre-emption system, and limited its operation to surveyed lands, which limitation, as the Justice states, was not removed until 1862.

If there were any doubt as to this being a proper interpretation of his language, we need only refer to the case of *Moore* v. *Robbins,* decided by Mr. Justice Miller himself, at the same term of the court, and reported in the same volume (96 U. S., 530–536), where he says:

> "In the recent case of *Atherton* v. *Fowler, supra* (page 513), we had occasion to review the *general policy* and course of the government in disposing of the public lands, and we said that it had formerly been, if it is not now, a

> rule of primary importance to secure to the government the highest prices that the land would bring by offering it publicly at competitive sales, before the right to any part of it could be established by private sale or by pre-emption. In the enforcement of this policy the act of September 14, 1841, which for the *first time established the general principle of pre-emption, and which has remained the basis of that right to this day,* while it allowed persons to make settlements upon the public lands as soon as the *surveys* were completed and filed in the local office, affixed to such settlement two conditions as affecting the right to a pre-emption." (Italics ours.)

Here we have his own interpretation of his language in *Atherton* v. *Fowler.* He states that in that case, in speaking of the early system, he was referring to "the general policy and course of the government in disposing of public lands," which course was followed "before a right to any part of it could be established by private sale or by pre-emption." Then he states that the act of 1841 established the *general principle of pre-emption,* and it was to this system that he was referring in *Atherton* v. *Fowler,* when he said that the *pre-emption system* only referred to surveyed lands.

When examined in the light of these facts and circumstances, the intent of the learned Justice, in the language quoted, becomes clear, and the entire misapplication of that language and misapprehension of its meaning by both the Interior Department and counsel for demurrants becomes equally clear. It had no reference to the early pre-emption acts, which were, indeed, not a *part* of the "general system," but *exceptions* from it, to cover special conditions, and surely should not be tortured into a declaration in opposition to the language of the early acts themselves, and to the universal construction given to those acts by the Executive Department, by Congress, and by the courts, both State and Federal, which have already been reviewed.

It is respectfully submitted, therefore—

(1) That the act of 1826 was wholly retroactive, in that it referred only to settlements made prior to January 1, 1825.

(2) That it covered settlements upon the unsurveyed public lands.

(*a*) Because by the express terms of the act of February 5, 1813, which was engrafted into and made part of the act of 1826, the lands affected were to be bounded by lines run or "*to be run.*"

(*b*) Because it embraced "any tract of land in the Territory of Florida," not rightfully claimed by any other person, and the court cannot limit this to surveyed lands only.

(*c*) Because to limit this act to surveyed lands would be a practical nullification of the act itself, in view of the fact that on the 1st of January, 1825, there were practically no surveyed lands in the Territory of Florida.

(*d*) Because, by contemporaneous construction of every department of the government, these early pre-emption acts were held to cover settlements upon the unsurveyed public lands.

(3) That the language of the court in *Atherton* v. *Fowler, supra,* has no reference to these early pre-emption acts, in that the court was referring to the "general land system," or the system of public sales prior to 1841, and to the "general pre-emption system," which meant the system established by the act of 1841, and was so interpreted by the court itself in the case of *Moore* v. *Robbins, supra.*

For these reasons it is respectfully submitted that this ground of demurrer is not well taken, and was properly disregarded by the court below.

V. Did the Ejectment of Robert J. Hackley from His Settlement by the Military Forces of the United States, and the Establishment of a Camp Thereon Prior to the Passage of the Act of April 22, 1826, Prevent Hackley from Acquiring a Right of Pre-emption in the Purchase of Said Lands?

The specification of demurrer by which this question is raised is found as section 3 of the joint demurrer (p. 80), as follows:

> "The act of April 22, 1826, making the act of February 5, 1813, operative in Florida, did not and could not have a retroactive effect upon the unlawful entry upon, and possession of, the lands described in complainants' bills by said Robert J. Hackley, for the reason that prior to the enactment of the law of April 22, 1826, the said lands had been entered upon and taken possession of by the government, and the government continued in possession thereof until the same were platted and offered for entry in 1883."

This is one of the grounds upon which the Secretary of the Interior rejected the claim of the Hackley heirs, and involves the point upon which the court below based its decision.

In the specification of demurrer above quoted, the contention against the Hackley claim is apparently based upon the allegation that Hackley was not in *possession* of the land in controversy on April 22, 1826, but that the government, through the military arm of the service, was in possession, and continued in possession until 1883.

We desire at the outset to *urge* upon the attention of the court that the act of April 22, 1826, did not require persons claiming a pre-emption thereunder to be in *possession* as of the date of the passage of the act. The sole requirement of that act was that the person should have actually "inhabited and cultivated" a tract of land situated in the Territory of Florida on or before the *first day of January*, 1825, and "should not have removed from said Territory." It follows that any person who had so inhabited and cultivated the tract of land prior to the 1st of January, 1825, and still resided in the Territory, *whether he resided on the land in question or not at the time of the passage*

of the act, came within its terms and was entitled to its benefits.

This was the construction given to the act at the time, for in a communication of the Commissioner to the Register and Receiver, May 29, 1835 (2 P. L. L. I. & O., 609), it was declared, in response to an inquiry upon the subject, that the fact that persons had removed from land *in no way affected their preemption rights,* and that there was no way to make them prove their claims before the expiration of the time fixed in the statute.

We insist that the rights of Hackley and his legal representatives must be tested by the language of the act, and not by provisions which are sought to be read into it.

This principle is elementary, has been reiterated time and again by both text-writers and decisions, and is well stated in Sutherland on Statutory Construction, Sec. 235, as follows:

> "It is the intent of the law that is to be ascertained, and the courts should not substitute their views of what is just or expedient. Courts are not at liberty to speculate upon the intention of the legislature, where the words are clear, and to construe the act upon their own notions of what ought to have been enacted. The wisdom of a statute is not a judicial question, nor can courts correct what they deem excesses or omissions in legislation, or relieve against the occasional harsh operation of a statutory provision, without danger of doing more mischief than good."

The following authorities also establish the same proposition:

Ryan v. *Carter,* 93 U. S., 78.
U. S. v. *Dickson,* 15 Peters, 141.
Mines v. *U. S.,* 15 Peters, 423.
U. S. v. *Arredondo,* 6 Peters, 691.

> "Where the legislature makes a plain provision without making any exceptions the court can make none."

French v. *Spencer,* 21 How., 288.
Yturbide v. *U. S.,* 22 How., 290.
Glasgow v. *Hortez,* 1 Black, 596.
Ross v. *Duval,* 13 Peters, 45.

We desire also to call especial attention to the fact that the act of April 22, 1826, did not except from its operation lands then in *possession* of the government, which had been settled upon

and cultivated prior to 1825. As a matter of fact, all the lands in the Territory of Florida were then in *possession* of the government, and it is an historical fact that troops were encamped throughout the Territory, in connection with the Indian troubles then existing. To except such lands from the operation of the act would render it a nullity. It would be little less than absurd to argue that the act of 1826 did not apply to lands because they might have been occupied on the date of the passage of the act by a temporary camp of troops, which might be removed the next day. At least Congress, with absolute control over public lands, made no such exception, and the court can make none.

Mr. Attorney-General William Wirt, in an opinion dated August 28, 1819 (Opinions of the Attorney-General, 211), in speaking of exactly the same language used in the act of 1814, says:

> "From the general language of this act the right of preemption runs through the *whole Territory*, except where the tract for which the settler contends is rightfully claimed by any other person. No such claim can, I conceive, exist as to lands *which were vacant and unappropriated at the time of the settlement.*"

The sworn statements of L. Thomas and others, on file as exhibits with the bill in this cause, show that these lands were vacant and unappropriated at the time Hackley made his settlement, and it was so found by the officers of the Interior Department. The lands, therefore, not being rightfully claimed by any other persons, came within the terms of the act of 1826, whether they were subject to temporary occupancy by the troops of the United States or not.

It is submitted, therefore, that a mere examination of the terms and provisions of the act of 1826 and the act of 1813, made a part thereof by reference, is a full and sufficient answer to the position taken by the demurrants in this specification of demurrer.

The Secretary of the Interior, in his decision of November 25, 1892 (R., p. 46), holds that the legal representatives of Hackley are not entitled to the land in controversy upon the ground that the occupation of the land, at the time of the passage of the act of 1826, by a detachment of United States troops in camp,

brought this tract within the exception contained in the act as land "rightfully claimed by any other person."

The learned judge of the court below bases his opinion (R., pp. 88 and 89) upon the same ground, holding that this occupation, being a rightful claim by some other "person," excepted this tract from "the right of pre-emption which would *otherwise have attached.*" (Italics ours.)

In the view of the Honorable Secretary of the Interior and of the judge of the court below, therefore, the decision of the whole case rests upon the issue raised by this specification of demurrer.

Realizing that the act of 1826 made no exceptions of land occupied, or even formally reserved by the United States (except by act of Congress.—Act 1813), the Department of the Interior and the court below, while speaking of this temporary occupation as a reservation (which term we will show is entirely inaccurate), have based their decisions, not on the fact that the land was reserved, for such a conclusion would be utterly without foundation in fact or in law, but upon the fact that such occupation constituted a "rightful claim of some other person."

In view of the fact, however, that they have used the word "reservation" with respect to this occupation by a detachment of United States troops, and in view of the importance which they have attached in their decisions to this point, we propose to meet fairly every possible question that can be raised by the specification of demurrer or by the decisions of the Secretary of the Interior or the court below, holding against the Hackley heirs upon this issue.

Insisting always that our clients come within the terms and intent of the act of 1826, and must be given its benefits, we will consider the questions raised by this demurrer and the opinions referred to under the following heads:

(1) The facts with reference to the possession and occupancy of this tract of land by the detachment of the troops of the United States;

(2) Whether or not this occupancy or possession constituted a "rightful claim by any other person";

(3) Whether the occupancy of this tract of land by a detach-

ment of troops prior to 1830 constituted a reservation of the land so occupied within the contemplation of the law or changed its legal status with respect to the act of 1826; and

(4) The real effect of the possession and occupancy of this land by the troops of the United States prior to 1830.

1. The Facts with Reference to the Possession or Occupancy of this Tract of Land by the Troops of the United States.

It is alleged in the bill (R., p. 5) that Hackley settled upon, inhabited and cultivated the tract of land in question in 1823, and continued in possession thereof until 1824, when a detachment of United States troops under the command of Col. George M. Brooke, in connection with Indian troubles then existing, took possession of said tract of land and established a camp, or cantonment, thereon; that said troops continued to occupy this camp until December 10, 1830, when, by executive order of the President of the United States, a military reservation was declared, embracing a large tract of land in this territory, the tract in question being a part thereof.

These allegations are admitted by demurrer and fully sustained by affidavits and other exhibits filed with the bill (R., p. 21, *et seq.*). It further appears from the record that this tract of land remained in reservation until 1883, when by formal order it was restored to the public domain.

During the period when said land was in reservation, Hackley and his legal representatives continued to assert their right thereto whenever the same should be released from government occupation. Subsequent to the restoration thereof to the public domain in 1883, the defendants and others initiated claims and attempted to secure the land under the pre-emption and homestead acts, and thereupon a controversy arose between these claimants making claims initiated after the restoration of the land to public domain in 1883, and the legal representatives of Hackley, basing their claim upon his settlement in 1823–'24, and the rights conferred by the act of 1826.

We ask the court to bear especially in mind the following points in the brief summary of facts above given, all of which are sup-

ported by the finding of the Secretary of the Interior, made a part of the record:

(1) The land in question was inhabited and cultivated by Hackley in 1823–'4;

(2) From 1824 to December 10, 1830, this tract of land was occupied by a detachment of troops in a temporary camp or cantonment.

(3) That this tract of land was actually reserved by executive order *for the first time on December* 10, 1830, more than four years after the passage of the act of 1826 (R., p. 51).

Secretary Noble, in his opinion (R., p. 36), holds that the settlement of Hackley was excepted from the provisions of the act of 1826, "being rightfully claimed as a reservation" at the date of the passage of the act.

Secretary Smith, in his opinion (R., p. 54), says: "The tract known as Fort Brooke Military Reservation was occupied under the direction of the Secretary of War two years before the passage of the act on which the claim of the Hackley heirs is predicated."

The court below, in its opinion (R., p. 89), says:

> "The Secretary of the Interior finds, as a matter of fact, that this land, known as Fort Brooke Military Reservation, was occupied under the direction of the Secretary of War two years before the passage of the act upon which the claim of the Hackley heirs is predicated, and this court is bound by such finding of fact."

In view of the ambiguous language contained in the statements of the Secretaries of the Interior above noted, and of the importance given thereto by the court below, it becomes necessary to examine critically the facts with respect to the occupation of this land by the troops of the United States, to ascertain, first, what was the true meaning and intent of the language used by the respective Secretaries of the Interior; and, second, to what extent it constitutes a finding of fact, and to what extent it is a mere conclusion of law which may be reviewed by the court.

It appears from the record, and is an historical fact of which the court will take notice, that the movement of these troops to Southern Florida was for the purpose of protecting and aiding Col. James Gadsden in running a line in accordance with a recent

Indian treaty, by which treaty the Indians were to be removed to a point south of the line so to be run. This will be clearly seen by reference to the orders and other papers among the public records of the War Department (made a part of the record in this case in the Interior Department), which, in so far as they are applicable to the point under consideration, are as follows:

"ADJUTANT-GENERAL'S OFFICE,
"WASHINGTON, 5 *Nov.*, 1823.

"Order 70.

"Brevet Col. Brooke, with four companies of the Fourth Infantry, will proceed with as *little delay as practicable* to Tampa Bay, East Florida, where he will establish a military post. He will select a position with a view to the health and in reference to the Florida Indians about to be removed to that vicinity agreeable to the late treaty. Upon this point he will consult Col. Gadsden, the commissioner employed in locating the Indians. * * *

"*The permanent headquarters of the Fourth Infantry will remain at Cantonment Clinch,* and, should Col. Clinch have rejoined his regiment, on the receipt of this order he will be charged with the duty of preparing Col. Brooke's command *for the expedition to Tampa.*

"By order of Major-Gen. Brown.

"E. KIRBY, *Aid-de-Camp.*"

"ST. AUGUSTINE, 1 *December*, 1823.

"DEAR COL. (BROOKE): I have this day received a copy of an order from the Adj. Genl's Office stating that four companies of infantry under your command had been *detailed* to occupy a post at the Bay of Tampa, and that you were instructed to consult with me as to the proper site. * * * *As I shall expect some facilities from your command towards the discharge of the duties as Indian commissioner assigned me,* I have to request that you will endeavor to make as *early movement as practicable,* so as to meet me about the time contemplated, *otherwise I may be much embarrassed in my operations, if not much exposed to privations of a severe character. I feel the more anxious on this subject as the Indians south have of late exhibited something like an unfriendly feeling, and are unwilling that I should run the line. Immediately your presence with troops will produce the most happy effect, and to your exer-*

tions I may acknowledge myself indebted for the faithful and efficacious discharge of the most arduous service I have undertaken.

"Your obedient servant,

"JAMES GADSDEN."

"CANTONMENT CLINCH, 3 *December*, 1823.

"*To Adj. Genl., Washington, D. C.:*

"SIR: I had the honor last mail to receive Orders No. 70. * * * I am well informed that in the neighborhood of Tampa Bay there is little timber, and none of it fit for building. * * * I have required of the Quartermaster Dept. at New Orleans the necessary number of tents, and as soon as they arrive I shall be more positive as it regards the time of my departure.

"Very respectfully, GEO. M. BROOKE,

"*Col., U. S. A., Commanding 4th Infantry.*"

"CAMP ON HILLSBORO RIVER, *Feb. 3d*, 1824.

"*To Maj.-Genl. Brown,*

"*Commander-in-Chief:*

"SIR: I have the honor to report that I left Pensacola with four full companies on 15 January last. * * * On the 22d met with Col. Gadsden, who had arrived some days previous, and who had made a partial reconnoissance of the country, but had not selected any particular spot. *On visiting several places, and after a consultation,* we determined on this place as the most eligible regarding the *object of the expedition.* * * *

"Immediately in the rear of this place, say two miles, the ridge of piney lands commence, in which I saw some very fine springs, and should the slightest disease manifest itself, we will *retire on it with our tents.* * * * I have not as yet seen many Indians, but expect to have a talk in a few days, as I have sent to the chiefs. Those whom I have seen do not appear to be well pleased with the treaty, and have expressed some dislike to Col. Gadsden's *running the line. They will be treated with kindness and respect, but at the same time with determination and firmness.* It would have a good effect on the Indians if some of our vessels of war were ordered to look into this bay frequently from Key West, from which we are but a short distance. The Indians appear to have no idea of the strength and power of the United

States. Col. G. left us two days since, himself and party in good health. Upon his request *I furnished him with three additional men.* The number of tents I should wish forwarded will be fourteen wall, two hospital, and forty common. By every opportunity I shall furnish such information as I may acquire of the country and its resources, with such other matters as may be interesting to the Department of War.

"I have the honor to be, with gr.

"Your very obedient servant,

"GEO. M. BROOKE,

"*Col., U. S. A., Commanding.*

"To Major-General JACOB BROWN,

"*Commander-in-Chief.*"

The nature of this movement and the temporary character of the occupation of this tract of land prior to the reservation in 1830, is obvious from a mere examination of the language of these orders and reports, and of the facts and circumstances existing at the time.

It will be noticed that the order for the movement of this detachment of troops was not an order of the Secretary of War, but emanated from the office of the *Adjutant-General* in the ordinary conduct of the military business of the government, and was signed by an *aid-de-camp.*

It does not direct the officer in charge of these troops to take possession of any *specific tract of land,* but simply to establish himself at some point to be agreed upon between him and Col. Gadsden, with a view to health and in reference to the Florida Indians about to be removed.

The order further specifies that the *"permanent headquarters of the Fourth Infantry will remain at Cantonment Clinch";* thus clearly indicating that it was contemplated that the establishment of this camp would be temporary.

A letter from Col. Gadsden to Col. Brooke bears out this conclusion, and Col. Brooke's report to the War Department, after stating that he visited several places and selected the camp from which he was writing, indicates that he may *retire therefrom* to some other point, in event of disease manifesting itself; the troops being quartered in tents.

It is a further historical fact, shown by the public records of the government at the time, that the removal of these Indians was attended with difficulty, and resulted in outbreaks which continued from time to time until the final termination of the Seminole wars, and the removal of this tribe to the western territory.

As a result of these conditions it was necessary for this and other camps to be continued far beyond the time contemplated by the parties, and the troops, as appears from the record, remained at this point still in cantonment or temporary camp until 1830, when, as was found by the Secretary, an executive order was issued establishing a large reservation, which embraced the point in question.

In the light of these facts, let us notice the language of the Secretaries of the Interior quoted above, and referred to by the court below in its opinion.

If Secretary Noble means by the expression that this land was rightfully claimed as a reservation in 1826, to state that it was in such reservation as to affect its legal status and to sever it from the public lands, his statement is in direct conflict with his own finding at page 36, where he states that "on December 10, 1830, said site was formally reserved by executive order, in which its limits were fixed at sixteen square miles." Until December 10, 1830, there was not the slightest suggestion of reservation of this land among the records of the government, nor of any other action with respect thereto which would affect its status as public land.

If the Secretary means that the occupation by the troops of the United States constituted a reservation, this is not a finding of fact, but a mere conclusion of law, construing the legal effect of the fact of occupation. This conclusion of law is in no sense binding upon the court, and, as we will show hereafter, is absolutely without support in reason or in authority.

Lee v. *Johnson*, 116 U. S., 48.

Secretary Smith, in the language above quoted and relied on by the court below, does not find that there was any reservation of this land prior to 1830, but says that the same was *"occupied"* by the troops of the United States two years before the passage of the act, which statement is literally correct. He then holds, how-

ever, that this "occupation" brought the land within the exception of land "rightfully claimed by any other person" contained in the act of 1826. In this conclusion of law the court below agreed with him, and upon this point alone sustained the demurrers to the bill. It is for this court to say what, if any, was the real effect of this occupation.

It will thus be seen that the record in this case clearly shows that there was no reservation of this land until December 10, 1830, more than four years after the passage of the act of 1826, and such is the finding of the Secretaries of the Interior in their respective opinions; that if the legal status of the land as public land were changed in any way prior to the 10th of December, 1830, it resulted solely from the occupation thereof by a detachment of troops in temporary camp or cantonment. The legal effect of such occupation, if any, is purely a question of law, as to which the courts are in no way bound by the finding of the Interior Department.

Lee v. *Johnson,* 116 U. S., 48
Johnson v. *Towsley,* 13 Wall, 72.

Let us now consider whether such occupation brought this tract of land within the exception contained in the act of land "rightfully claimed by any other person."

2. Did the Occupation or Possession of the Tract of Land in Question at the Date of the Passage of the Act of April 22, 1826, Bring this Tract of Land within the Exception Contained in the Act, of Land Rightfully Claimed by any other Person?

The Act of 1826 gives the right of pre-emption to any tract of land in the territory of Florida, "which tract is not rightfully claimed by any other person" at the date of the passage of the Act.

We will undertake to show:

(1) That the temporary occupation of this tract of land by the troops of the United States in 1826, did not constitute a *claim* to the land at all; and

(2) That even if it had been claimed, it would not have been within the terms of the Act, since it was not a claim by "any other person."

1. *The possession of this tract of land by a detachment of troops in temporary camp did not constitute a claim to the land within the meaning of the Act of* 1826.

Under this head, we submit the following propositions:

(*a*) That there was never in fact any *claim* to the land by Col. Brooke in his personal capacity, or by any one in his command. Indeed, it is a fact admitted by all parties that no claim to this land was ever made by any person other than Robert J. Hackley, or his legal representatives, until subsequent to 1883, when the claims of the appellees were initiated;

(*b*) That the temporary occupation by a detachment of troops having their permanent headquarters at Cantonment Clinch, did not, and could not, constitute a claim to the land by Col. Brooke as an agent or officer of the Government, on its behalf.

The record shows conclusively that Col. Brooke never thought of making any claim to the land in question as an officer of the United States. He gave an affidavit of Hackley's settlement and cultivation to enable Hackley to perfect his claim. During his occupation of the land by the troops of the United States, he simply took possession of the same so long as required for the purpose of his expedition. He had authority to do this, and no more. His claim, if any, was limited to the right of *possession*, as distinguished from the *title* to the thing itself.

Even if Col. Brooke had undertaken to lay a claim on behalf of the United States to the land in question, so as to segregate the same from the other public lands, he could not have done so under the law.

This subordinate officer, in charge of a small detachment of troops, was an agent of the government, with limited and well defined authority. That authority extended only to the movement of the troops under his command, under orders from his superior officers. It had no relation to the public lands, and he was given no jurisdiction over the same, further than a possession of such parts thereof so long as such possession was necessary to the conduct of the military operations in progress. It has been held in numerous cases that in order to create a reservation of public lands, so as to segregate the same from other adjoining lands, or to exempt it from the operation of an act of

Congress, it must be reserved by competent authority, and with such order of reservation there must be accurate description of the land reserved, by metes and bounds; that such reservation must be made with such solemnity and publicity as will forever set apart the lands so reserved, so that they cannot be disposed of other than by act of Congress.

Wolsey v. *Chapman,* 101 U. S., 755.
United States v. *Tichnor,* 12 Fed. Rep., 421.

The Constitution gives to Congress the sole and exclusive power to dispose of, and to make regulations respecting the public lands. The courts have held that the President of the United States has the power, as commander-in-chief of the army, by executive order, to reserve public lands from sale where the same are necessary for military purposes, and this doctrine has been carried to the extent of holding that an order issued by the Secretary of War is construed to be an order of the President himself for this purpose, and where such order is made with the formalities and description of the land required by law, it will be effective to create a reservation.

The most liberal interpretation of this doctrine, however, has never carried it to the extent of holding that an order of a subordinate officer of the government, even if made for the purpose of affecting public lands, is effective so to do, because the presumption which holds in the case of the Secretary of War, that he is acting as the mouthpiece of the President, does not apply in the case of orders issued by subordinate officers.

See *Wilcox* v. *Jackson,* 13 Wall., 498.
United States v. *Stone,* 2 Wall., 537.
Missouri, &c., Ry. Co. v. *Roberts,* 152 U. S., 119.
Morrow v. *Whitney,* 95 U. S., 551.
Wilcox v. *McConnell,* 13 Pet., 498.

The distinction between mere "occupation" and reservation of public lands is clearly drawn in *Morrow* v. *Whitney, supra.* There the statute under construction excepted lands "occupied by the United States for military purposes." The court held that occupation was a fact to be shown by parol evidence, while reser-

vation was a matter of record to be shown by copy of the President's order.

If, therefore, it be contended that Col. Brooke, by taking possession of this land as a temporary camp or cantonment, was in fact *claiming* the same on behalf of the United States, such contention would be met by the *fact* that there is nothing in the record to show any such claim on the part of Col. Brooke or the government; and by the *proposition of law* that even if he had undertaken to make such a claim, he would not have been vested with authority so to do for the reasons:

(1) That it was not within the scope of his authority, as a subordinate military officer of the government, to make claim to public lands of the United States so as to affect in any way their legal status.

(2) That a reservation of public lands or any act setting apart the same, or segregating the land from the general body of the public lands, is an exercise of discretion which by the Constitution is vested in Congress, and by construction has been held to have been vested in the President of the United States—a discretion and judgment, however, which cannot be delegated to a subordinate officer, even if it is sought so to do.

> "If discretion and judgment are to be exercised either as to time, ownership or feasibility of the exercise of an official function, the body or officer charged with the duty to decide must exercise it, and can not delegate it to any other officer or person." (Am. & Eng. Ency. Law (1 ed.) Vol. 19, 441.)

It has been held, by the Supreme Court of the United States, that mere occupation of a tract of public land by an officer of the government in the performance of his official duties, is not an occupation by the United States, and is no bar to the initiation of a pre-emption claim.

Thus, in the case of the *United States* v. *Fitzgerald,* 15 Peters, 407, an official of the Treasury Department connected with the revenue service, occupied a strip of land in the delta of the Mississippi, which had been occupied by a boarding officer in that jurisdiction for many years. During such occupation he made claim in his personal capacity to the right of pre-emption in the

purchase of the land under the act of May 29, 1830, which right was recognized and a patent granted. The United States brought suit to recover the land upon the ground that it was not subject to the right of pre-emption, since it was occupied by him as an officer of the government at the very time that he initiated his right, and that this occupation being, as it was claimed, the occupation of the government, prevented the right of pre-emption from attaching. The effect of such occupation by him as an officer of the government upon the right of pre-emption to the land was squarely raised by counsel for the government, at pages 414, 415 of the report, in the following language:

> "Now the evidence in this case shows that the settlement of Fitzgerald bears no resemblance whatever to such occupation (*bona fide*). Even if he cultivated this remote, inhospitable strip of land jutting into the ocean, it was done with no such intention on his part. He went there from necessity as a public officer for a public purpose. He was sent there. Can a public officer sent for a public object, on a part of the public domain, be construed as a settler? Could a body of troops stationed through the winter on public land near the frontiers acquire the pre-emption rights of settlers? Fitzgerald admits that he went to this place as a boarding officer; that he took possession as such; that he occupied the cabin as such; the Collector proves that in such capacity he allowed such occupation. If this gives a pre-emption right, there is no occupation of the public soil for public purposes by an officer sent upon it, that will not give it."

The Court in passing upon this contention says:

> "No authority is known to exist in any collector under the law to make an appropriation of land for use of the United States."

In the Fitzgerald case the facts were much stronger against the pre-emption claimant than in the case at bar. There the land had been occupied for a long time for government purposes, and was in actual occupation for such purposes at the time of the *initiation* of the pre-emption claim. It was a claim against the *government,* in which the claimant is always at a disadvantage.

In this case, on the contrary, Hackley's claim was initiated long before there was any possession by troops. He makes no claim

against the government, but it is a contest between private individuals where the priority of his claim is admitted. In this case the occupation at the time of the passage of the act was only temporary in its character, and it was obviously contemplated that it was to be temporary in fact. The fact that subsequent events made it necessary to prolong this occupation affected in no way the right of Hackley, which had already attached, further than to suspend the enjoyment of that right until the occupation of the government terminated.

It is respectfully submitted, therefore:

(1) That the occupation of this tract of land by Col Brooke, in temporary encampment, was not in fact, and was not intended to be, a *claim to the land* on behalf of the government of the United States.

(2) That even if it had been so intended, the occupation under the facts as disclosed by the record, a subordinate military officer of the government, exercising his own discretion as to the selection, for the temporary purposes of a military encampment, could not as a matter of law have constituted a claim to the land itself, and could not have affected the legal status of the same, or severed it from the general domain, or exempt it from the operation of an act of Congress.

That this mere temporary occupation by a detachment of troops in camp was not a claim to the land itself within the meaning of the act of 1826, becomes more apparent, if possible, from a consideration of the conditions existing at the time, which Congress must have had in view.

The Territory of Florida was ceded to the United States by the government of Spain in 1819. At the time of this cession there were numerous claimants to portions of the public land in the territory, under grants from the Spanish government made prior to the cession, some of which were valid and others not, and between the time of such cession to the passage of the act of 1826, such claimants had sold portions of the land claimed by them to other settlers in the territory.

The reports of the United States Supreme Court are full of cases arising under these Spanish grants. The government appointed a commission to consider and pass upon such cases and

difficulties arising from these grants, and claims thereunder were at the time of the passage of the act of 1826 demanding the constant consideration of the executive, legislative, and judicial departments of the government.

Under such conditions, if Congress had made a grant of the right of pre-emption in the purchase of land to any settler who had inhabited and cultivated the same prior to 1825, without exception, it would have given rise to numerous contests between claimants under Spanish grants and other similar claims, and persons claiming under the pre-emption act.

To avoid these conditions and any conflict of interests of the pre-emption claimants with prior and superior rights of other persons, Congress embodied in the act the provision that it should not apply to lands "rightfully claimed by any other person." This language was plain in itself. When taken in connection with the existing circumstances at the time of the passage of the act, it can have but one meaning and one application, and that is, that it referred and was intended to refer only to private land claims in the Territory of Florida.

Another historical fact which is abundantly shown by the record and the history of that period, is that at the time of the passage of this act, owing to Indian troubles existing, there were encampments of troops on the public lands throughout Florida.

It may be asked, therefore, if Congress desired to except from the operation of the act of 1826 lands so occupied by the troops of the United States, who might be removed the next day without affecting the legal status of the land, why did it not specifically make such exception? Is it conceivable that in passing a general act of this kind, if Congress desired to except such lands it would have done so in the narrow and ambiguous language of lands "rightfully claimed by any other person"?

Before and after the act of 1826 it was often the custom in such acts to make exceptions of lands "occupied" or "reserved" for military or other purposes. (See act of June 13, 1812, 3 Stats., 748; act of February 21, 1823, 3 Stats., 724, and act of May 29, 1830, 4 Stats., 420.)

The act of February 23, 1823, expressly excepted lands *occupied* for military purposes. In *Morrow* v. *Whitney*, 95 U. S.,

551, this act is considered, and the difference between "occupation" and reservation is pointed out.

The act of 1813, incorporated into the act of 1826, excepted lands "reserved from sale by *former acts,* or lands which have been directed to be sold in town lots and out-lots." While making such exceptions, can it be conceived that if Congress intended to except lands then "occupied" as military camps, it would not have done so, as in the act of June 21, 1823, only three years before (*Morrow* v. *Whitney, supra*)? To ask the question is to answer it. It is little less than absurd to contend that Congress, with title to nearly all of the land in Florida, and full power to make reservations and exceptions, would have rested a *claim* upon a mere temporary occupation of a few companies of troops, which might have been ended next day by a subordinate military officer. We respectfully submit, therefore, that neither in fact nor in law did this temporary occupation of the tract of land in controversy by Col. Brooke and his detachment of troops constitute a *"claim"* to the *land itself,* either on the part of Col. Brooke or on behalf of the government of the United States.

The words "rightfully claimed" as used in the act could have no other meaning than a claim of title, as the United States already had title to all lands made subject to pre-emption by the act, if these words applied to the title of the United States or to a person claiming for the United States, it would have eliminated all lands from the operation of the act, and rendered the same a nullity. Such a construction would be opposed to principle and authority.

2. *Even if such occupation had been a claim to the land, it would not have been within the terms of the exception contained in the act, since it was not a claim of "any other person."*

We have seen that neither Col. Brooke nor any other person except Robert J. Hackley ever made claim to this tract of land until after 1883.

We insist, however, that even if the mere occupation or possession of this tract of land in 1826 by a temporary camp of troops could be contorted in fact or in law into a "claim to the land," yet such claim could not come within the terms of the exception contained in the act, as the word "person" cannot be construed to embrace the United States Government.

This point was directly decided by the Supreme Court of the United States in the case of *United States* v. *Fox*, 94 U. S., 321.

In that case a devise of land had been made by a resident of the State of New York to the government of the United States. The statute of New York provided that a devise of land might be made to any person capable by law of holding real estate. The question for consideration was whether or not under such a statute a devise to the government of the United States was valid, or whether the government was a "person" within the meaning of the act. The Supreme Court of New York held the devise invalid, upon the ground that the word "person" could not be construed to mean the government. The Supreme Court of the United States on appeal held as follows:

> "The statute (of New York) provides that a devise of land may be made to any *person* capable by law of holding real estate, but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise.
>
> "The term 'person' as here used applies to natural persons and also to artificial persons, bodies politic deriving their existence and powers from legislation, but cannot be so extended as to include within its meaning the general government. It would require an expressed definition to that effect to give it a sense thus extended."

See also *U. S.* v. *Perkins*, 163 U. S., 630.

In the case of *The Alabama Certificates*, 12 Opinions of the Attorney-General, 176, the Hon. Henry Stanberry, Attorney-General of the United States, was called upon to decide whether or not the term "person," as used in the revenue act of July 13, 1866, embraced a State. The act in question levied a tax of 10 per cent. upon the notes of "any person, State bank or State banking association, used for circulation," etc. By the forty-fourth section of the act it was provided that "any word or words in any or all parts of this act, and of all acts to which this act is additional, indicating or referring to person or persons, shall be taken to include partnerships, firms, associations, bodies corporate or politic, or any other party whatsoever when not otherwise designated, or manifestly incompatible with the intent thereof."

The obvious intent of this act was to prevent the circulation as currency of notes or paper issued from any other source than national banks or the government of the United States, and by well recognized rules it was of course to be construed to accomplish this purpose. The language defining the word "person" quoted above was, it seems, as broad as it could be made.

The State of Alabama issued certificates for circulation, and the question was whether or not they were subject to taxation. If the language of the act and the broad definition thereof could be construed to embrace a statute, they were subject to taxation; otherwise not.

At page 180 the Attorney-General says:

> "We come, then, to the very point. Is the term 'person,' as used in the ninth section, and as explained in the forty-fourth section, to be held to include a State? After the most careful consideration, I must answer this question in the negative. A State is in one sense a body politic and corporate. In the largest meaning of the word 'corporation' a State is a corporation, and the United States is a corporation, and they are both bodies politic as well as corporations, but a private corporation is a body politic and corporate, and is so described in our elementary books."

After discussing the subject at some length he says:

> "And if it was intended to include a State, why not say a State, without any circumlocution? If it was intended to include a city, why not name it? But here a State or city is not named, nor is the usual term of description, to-wit, a public corporation, used to embrace them."

So in the case now under consideration, if Congress *intended* to exempt from the operation of this act lands in the temporary *occupation* and use of troops of the United States engaged in military service, why not say so?

In his opinion on *Tax of State Railroads and Manufacturers,* 12 Op. Atty.-Gen., 277, the same Attorney-General renders an opinion upon the act of June 30, 1864, levying a tax upon every person, firm, company or corporation owning or possessing, or having the care or management of any railroad," etc., and there is incorporated in this act the same broad definition of the term

person or corporation as is contained in the act of July 13, 1866, above referred to. The question was whether a State owning or managing a railroad was subject to taxation under the terms of this act. After reviewing the language and calling attention to the fact that Congress could have used the term "State" if it had intended that a State should be embraced within the meaning of the act, the Attorney-General says:

> "Standing, then, upon the language used in these sections alone, I am of the opinion that they do not authorize a tax upon the gross receipts of a railroad owned by a State, or upon interest payable upon its bonds, if it have any outstanding, or upon its accumulated profits."

So in this case, standing upon the language of the act, we earnestly insist that a mere occupation of this tract of land by a detachment of troops of the United States cannot bring the land within the exception of a tract rightfully claimed by any other *person*.

It is respectfully submitted, therefore—

(1) That no claim to the land in question was ever made by the government or any one else, based upon the occupation thereof in 1826.

(2) That such occupation could not bring the tract of land within the exception named in the act, because—

(*a*) It was not sufficient in *fact* or in *law* to constitute a *claim* to the land.

(*b*) It could not by any reasonable construction be said to be a "claim of any other *person*."

(3) That the exception was simply intended to protect valid private land claims, and should be so construed.

3. Did the Occupation of this Tract of Land by a Detachment of Troops, in Camp from 1824 to 1830, Constitute a Reservation of the Land or Change its Legal Status with Respect to the Act of 1826?

The Constitution of the United States, Article IV., section 3, vests in Congress "power to dispose of and make all needful rules and regulations respecting the territory" of the United States.

The power to dispose of the public lands carries with it the power to reserve the same from the operation of a general act mak-

ing such disposition, and authority need hardly be cited to show that where Congress, having special control of the public lands, passes such general acts without making exceptions, such acts will operate upon all the lands in the said territory.

Donaldson, in his History of the Public Domain, p. 249, states the method of creating a military reservation from the public lands, as follows:

> "The commanding officer of a military department recommends the establishment of a reservation with certain boundaries. The Secretary of War refers the papers to the Interior Department, to know whether or not any objection exists to the declaration of the reserve by the President. If no objection is known to the General Land Office, and it is so reported, the reservation is declared by the President upon application of the Secretary of War for that purpose, and the papers are sent to the General Land Office through the Secretary of the Interior for annotation upon the proper records."

It thus appears that such reservations can only be lawfully made by Congress, by the President, or by some head of department acting for the President, such as the Secretary of War or the Secretary of the Interior.

As we have already seen, even an order of the President must designate the land to be reserved by metes and bounds, and comply with other formalities to segregate the same from the public domain, or remove it from the operation of a general act of Congress.

Walsey v. *Chapman,* 101 U. S., 755.
Morrow v. *Whitney,* 95 U. S., 551.
Missouri, etc., Ry. Co. v. *Roberts,* 152 U. S., 119.
U. S. v. *Tichnor,* 12 Fed. Rep., 421.

The order under which this land was occupied *contained no reference* to public lands. It was not issued by the President or any one authorized to speak for him, but by a military officer through an *aide-de-camp.*

No authority can be found to sustain the suggestion that any subordinate officer can make a reservation of public lands so as to

remove the same from the operation of an act of Congress. There are, however, authorities directly to the contrary.

In the case of *United States* v. *Tichenor,* 8 Sawyer, 142; 12 Fed. Rep., 415, this question was elaborately discussed. That case involved a claim under the Oregon Donation act of September 27, 1850 (9 Stats., 497), which act gave to every person "who is a citizen of the United States, now residing in said territory, or who shall become a citizen thereof on or before the 1st day of December, 1850, and who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act, the quantity of one-half section, or three hundred and twenty acres of land, if a single man," etc. The act also provided "that such portions of the public lands as may be designed under the authority of the President of the United States for forts, magazines, arsenals, dock-yards, and other needful public uses, *shall be reserved and excepted from the operation of this act.*" (Italics ours.)

In July, 1851, William Tichenor settled on a tract of land under said act, and laid off a town thereon, called Port Orford.

In September, 1851, Lieutenant Wyman, United States army, erected some buildings upon a portion of the town site, for use of troops when stationed at that point.

On October 16, 1851, General Hitchcock, United States army, in command of the district, "ordered that a military reservation be established there, and that a tract of land be selected and set apart and reserved for that purpose;" and soon after Wyman "caused a tract of land to be marked out for and as a military reserve, including the buildings aforesaid, which also included a *portion of the tract settled upon by Tichenor.*"

On March 17, 1852, the said "military reservation was duly published."

On September 29, 1856, Tichenor made proof of his four years' residence and cultivation, as required by the Donation act, including in the land claimed so much of the reservation as fell within the lines of his original tract. On February 5, 1866, a patent was issued for the whole donation, *including this portion of the reservation.* In 1880 the government brought suit to cancel the patent as to the portion of the reservation included therein.

It will be seen that this act expressly excepted from its operations lands reserved for military and other purposes named, and that the settler acquired no perfect right until he had completed his four years' settlement and made proof of the same; that within a few months after the initiation of the settlement an officer of the United States army erected buildings thereon for the use of troops, and the reservation thereof was declared by a general of the United States army commanding in the district.

The act of 1826 contained no exception as to military reservations, and it is admitted that no defined boundaries of Cantonment Brooke were given, and no proclamation of a reservation, and no record of such a reservation made until 1830. The Tichenor case, therefore, is much stronger in favor of the reservation than the Hackley case. Notwithstanding these facts, the court held, without hesitation, that there was no authoritative reservation of the land in controversy which would defeat the settlement right of Tichenor to his entire tract, including that which the general of the United States army *had attempted to reserve,* and upon which buildings were erected within two months after the initiation of the settlement.

At page 151 the court says:

> "The power to dispose of the public lands is granted to Congress. No appropriation of them can be made for any purpose but by authority of Congress. (*United States* v. *Fitzgerald,* 15 Pet., 421.) By the Donation act Congress disposed of all the public lands in Oregon to persons who should become settlers thereon, and otherwise comply with the provisions of that act, except mineral lands, lands reserved for salines, and such portions thereof as might be designated by authority of the President for forts, etc.
>
> "The reservation must be designated, marked out, and appropriated to the permitted public use by the President, or under his directions. What constitutes such a designation may be a question. *At least, the reservation ought to be described or indicated with reasonable certainty as to limits and quantity, in some public document on record, and probably it ought to be noted on maps of the public surveys.* (*Wilcox* v. *Jackson,* 13 Pet., 512; *United States* v. *Fitzgerald,* 15 Pet., 419.)
>
> "But it does not appear from the public surveys that a reservation at Port Orford has ever been entered thereon

for any purpose. Neither is there any allegation in the bill that the reservation was ever designated or marked on the map or any survey; and, what is more, that it was designated or authorized at all *by the President.*

"It may be admitted, as suggested in *Wilcox* v. *Jackson,* 13 Pet., 513, that if the order directing the reservation to be made had been issued by the Secretary of War—the head of the department through whom the President would speak and act upon the subject—in the absence of evidence to the contrary, it would be presumed that he acted by direction of the President.

"But *neither General Hitchcock or Lieutenant Wyman had any authority to designate or establish a reserve at Port Orford for any purpose.* It is not alleged that they were acting in the premises under authority of the President, and there is no presumption of law that they were.

"It may also be admitted that General Hitchcock could direct his subalterns engaged in military operations in Oregon to establish and *equip a camp or fort on the public lands thereunder;* or that the latter might do so under the circumstances *without any direction from the former; but such use or occupation would not have the effect to import any special character to the land, or constitute it a reservation for any purpose within the purview of the Donation Act.* It would still remain open to the claim of any qualified settler under the act, and as soon at least as the camp or post was removed or abandoned by the military force, might be actually occupied by any such settler." (Italics ours.)

The language quoted is directly applicable to the Hackley case. By the pre-emption act of April 22, 1826, Congress "disposed of all the public lands" in Florida to persons who had settled thereon prior to January 1, 1825, which lands were not rightfully claimed by any other person. In order to constitute such a reservation as would remove the lands from the operation of this act, if any reservation would have done so, it must have been designated and indicated with reasonable certainty upon the public records by order of the President or Congress. No such designation was ever made until 1830, after Hackley's right had vested, and there is nothing on the public records with reference to this land until that date. Neither the President nor the Secretary of War directed Col. Brooke to take possession of this *particular tract of land,* and there is nothing in his orders with refer-

ence to the same. Reservation after the act of 1826 could not affect his rights (*U. S.* v. *Fitzgerald,* 15 Peters, 419).

As stated by the court, with reference to General Hitchcock, even if he had attempted to make such reservation, it would not have given to the land so selected any special character, nor would it have interfered with the pre-emption rights of a former settler thereon, further than to suspend his *occupancy* until the camp or post was removed. It would seem that the Tichenor case is conclusive of this case upon the question of reservation.

The case of *Johnson* v. *United States,* 2 Court of Claims Reports, 391, also involved a claim under the Oregon Donation act. The court in that case, however, bases its decision upon authorities construing the early pre-emption acts, and in speaking of the analogy between these acts, and after stating that an effort had been made to distinguish between them, says:

> "In the first place the payment of money was only a part of the consideration given by the grantee under the pre-emption acts. There, as here, he was required to occupy and cultivate. There the grant was restricted to even a smaller tract than was here given, and the policy and chief end of the statute as to this was to foster the advance of civilization into the uninhabited and useless portion of the national domain. The Donation Act was only an advance on the same line of national policy, and the patent which it promised was not a naked gift, but a grant upon a present consideration received and accepted by the grantor. This consideration was just as valid and binding upon the government as the other, for in the eye of the law services are as sufficient a consideration to support a grant as money or services and money."

It will be thus seen that the court places the two classes of acts upon exactly the same basis, and the Johnson case is, therefore, directly applicable to the case at bar.

In July, 1850, Johnson settled at the head of ocean navigation, on the Columbia River. He continued to reside on the land until 1856. In that year, before he had made proof of his settlement, when, as the court states, "his title rested entirely upon his four years' continuous residence and cultivation, and previous notification," he was ejected from his settlement by a detachment of United States troops, who established a military

post thereon and erected buildings for the accommodation of the troops. The following facts as to this occupation are taken from the opinion, page 413:

> "The story of its occupation is briefly detailed by General Wright, commanding the Department of the Pacific, and is as follows: 'In the spring of 1856, when I was in command of the United States troops operating against hostile Indians in Oregon and Washington Territories, *I found it necessary,* to preserve my line of communication, to establish a post on the Columbia River, at the foot of the Cascades. A small reservation was laid off and block-house erected. The post thus established and known as Fort Cascades was occupied until 1861, when the troops were temporarily withdrawn, and the building and grounds placed under charge of an agent of the Quartermaster's Department.' "

It further appears from the opinion that the property remained in the possession of the United States until the bringing of the suit, and that subsequent to the institution of the suit the Secretary of War issued an order formally reserving the same as a military reservation.

Upon the facts above stated the court held that Johnson was entitled to his land, and that there had never been any military reservation of the same. At page 413 the court says:

> "But in addition to the legal conclusion which we here reach, we are of opinion, as a matter of fact, *that no military reservation was ever made or intended to be made by the government.* . . . Up to the time of the commencement of this action there is nothing to show that the subject of this reservation ever received a thought from the *President* or from any officer *authorized to speak for him.* There are indeed certain documents printed in the record, consisting of communications and reports from the officers in the War Department, which may indicate, if not establish a *recent* determination of the Secretary of War to retain the post at the foot of the Cascades and make it permanent; but this determination, if it exists, and all of the communications which indicate it, are *subsequent* to the bringing of this action." (Italics ours.)

In this case the post was marked off, and established at the time the troops took possession and buildings erected thereon;

while in the Hackley case the communications from Col. Brooke indicate that there were no boundaries fixed for the camp; that his occupancy was intended to be only temporary; that he anticipated he might remove to another section, and the occupancy of the troops prior to 1830, so far as the record shows, was in tents, and but a temporary encampment, with no idea of a reserve until the continued troubles made it necessary to establish a permanent post, which was done by the order of December 10, 1830, establishing the reservation, four years after Hackley's rights had vested.

We desire to call attention in this connection to only one more case, as we regard the above cases as conclusive.

In the Camp Stambaugh case, however, the Attorney-General, the Secretary of War and the Secretary of the Interior, all united in supporting our contention that a reservation of the public lands can only be made by Congress, or the President, or some one acting in the name of the President.

In the early part of the year 1870 numerous citizens of Sweetwater county, Wyoming, petitioned the War Department to station an efficient military force in that county to protect the miners from the depredations of hostile Indians.

In compliance with said petition the War Department, in June, 1870, established a military post in said county, consisting of two companies of troops, as a sub-station of Fort Bridger, W. T., designated as Camp Stambaugh (War Department Records), but soon after it was made an independent post, as shown by the following order:

"HEADQUARTERS DEPARTMENT OF THE PLATTE,
"OMAHA, NEB., *August* 20, 1870.

"GENERAL ORDERS, No. 35.

* * * * * * * *

"11. Camps Brown and *Stambaugh*, Wyoming Territory, heretofore sub-stations of Fort Bridger, W. T., are hereby announced as independent posts.

"By command of Brigadier-General Augur,

"GEO. D. RUGGLES,
"*Assistant Adjutant-General.*

"Official. (See official printed copy, Record.)"

This post, though located on unsurveyed lands, was laid off as a reservation by the officers in charge, and included all the territory within one mile in each direction from the flag-staff erected at the post. Government buildings were erected thereon, and military occupancy thereof maintained for over eleven years. The following communication from the Secretary of the Interior to the Commissioner of the General Land Office, dated June 6, 1881, will show the executive construction of the legal effect of such occupancy, and the manner in which this land was subsequently disposed of by the Interior Department.

> "From the statement of the War Department and your reports, it appears that there was never any formal establishment of the post nor order of the reservation of the lands lately occupied as a military encampment, known as Camp Stambaugh, * * * but that the occupation by the troops has been maintained for temporary purposes.
>
> *"Under these circumstances I do not consider the lands ever to have been regularly and properly subjected to the exclusive control of the War Department as an established military post.* Such also appears to be the opinion of the Secretary of War, as expressed in his letter of the 3d ultimo, advising me of the abandonment of the military.
>
> *"You are therefore instructed to regard them as public lands, subject to disposal, as though never made subject to such occupation."* (Copp's Public L. L., 1882, Vol. 2, p. 389.) (Italics ours.)

At the time this case arose (in 1881) there was no authority to dispose of military reservations except by special act of Congress (Donaldson's Pub. Dom., 249.) If, therefore, this was a reservation within the true meaning of that term, the department had no power to dispose of the same without such an act. The ruling of the Secretary of the Interior, the Secretary of War and the Attorney-General, therefore, is equivalent to a decision that the lands set apart by the order of the Adjutant-General did not constitute a military reservation, and could be disposed of without act of Congress, and conclusively support our contention that, in order to create a reservation which would take the land out of the operation of the act of 1826, which makes no exception of lands of this character (even if a reservation would

have done so), the land must be designated, described and declared by Congress, by the President, or by some head of department acting under his orders, within the scope of his authority.

In this case, as we have seen, there is nothing on the public records of the department with reference to the particular tract of land in question, until the reservation was declared in 1830. It was never designated. No specific order was ever given by the President, or any one for him, directing that this particular land should be reserved, or the possession of the specific tract should be taken by the troops of the United States. It was simply occupied in the ordinary conduct of military affairs by troops in the field, under orders emanating from the office of the Adjutant-General of the army.

As we have seen, the act of February 21, 1823 (3 Stats., 724) excepted lands "occupied for military purposes," and the Supreme Court in *Morrow* v. *Whitney*, 95 U. S., 551, 556, holds that "occupation" is a matter to be shown by parol evidence, while "reservation" is a matter of record to be proved by copy of the order of the President.

Secretary Smith, in his decision adverse to the Hackley heirs, and the demurrants in their briefs, have relied, in this connection, on the case of *Wilcox* v. *Jackson*, 13 Pet., 498.

In that case Jackson made pre-emption claim under the act of 1830, as extended by the act of 1834, based upon settlement made by one Beaubean. The act of 1834 expressly *excepted from its operations lands reserved by Congress, the President, or other competent authority, for any purpose whatever.*

The land in question was a part of Fort Dearborn, near Chicago. It appears that this post was established by the United States in 1804, and was under the control and occupancy of the government from that year until subsequent to the institution of the proceedings.

In 1817 Beaubean bought a house from an army contractor, located on the land embraced within the post.

In 1823 he purchased other houses located upon the property.

In 1824 the land was formally set apart by the Secretary of War as a military reservation.

In 1831 Beaubean made pre-emption claim to the land occupied

by him, which was rejected, upon the ground that the land was reserved for military purposes.

In 1834 he made another claim, which was rejected.

In 1835 his pre-emption claim was allowed by the Land Office at Chicago. He then sold his interest to the plaintiff, who attempted in an action of ejectment to recover possession from Wilcox, who was an officer of the United States army, in charge of the post.

The court held upon these facts that the land was reserved and appropriated by the United States, and no pre-emption right therein could be acquired under the act of 1830 or 1834, which acts, as we have seen, expressly excepted any lands reserved by Congress or the President, for any purpose whatsoever, a provision which was not contained in the act of 1826.

It was in this connection that the court used the following language, which is so earnestly relied upon by counsel for the demurrants, and made a basis for the decision of the Secretary of the Interior:

> "But we go further, and say that whensoever a tract of land shall have once been legally appropriated, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law or proclamation or sale could be construed to embrace it or to operate upon it, although no other reservation was made of it."

This broad statement is mere dictum. When carefully examined in connection with the facts of the case under consideration, however, it does not conflict with our position in this case. In *Wilcox* v. *Jackson,* the land had been set aside and enclosed as a military post thirteen years before the settlement was made, and was excepted, by the terms of the act under which the pre-emption was made, from the operation thereof. The court found as a fact that it had been actually appropriated by order of the President for military and light-house purposes. This may well be said to have been such an appropriation as to prevent the operation of the pre-emption act, which *expressly excepted* lands of this character from its provisions.

It is further noted that the court uses the terms "legally appropriated," which means that if the land is segregated or set aside

for a special purpose by authority of law. This is apparent from the opinion of the court, which refers to various acts of Congress involving such appropriation of the public lands, *i. e.*, the act of May 31, 1798, authorizing the President to erect fortifications; act of April 21, 1806, authorizing the President to establish trading houses at posts or places on the frontier; act of June 4, 1809, to erect fortifications for the protection of the Northern and Western frontier. And also an appropriation by Congress for the erection of a light-house on the land in question. But as we have seen, the courts hold that the only authority which can make such "legal appropriation" is Congress, which is given the power by the Constitution, or the President, or some head of department acting for the President, and that it must be done by designating the tract of land so as to sever it from the public domain. A mere occupancy by troops of the United States in temporary camp is not an appropriation of the land, for the term "appropriation" means a setting aside or severance from the general mass. It is certainly not an appropriation by an authority vested with the power under the law to appropriate the public domain, and as was said in *United States* v. *Tichenor, supra,* "Such use or occupation would not have the effect to import any special character to the land, or constitute a reservation," etc.

We submit, therefore, that the case of *Wilcox* v. *Jackson,* based upon facts which show that the land was actually reserved and a fortified post before settlement, and had remained in possession of the United States for years, and in which the pre-emption claim was made under an act expressly excepting from its operation lands reserved for any purposes whatever, can have no bearing upon the case at bar, in which there was no reservation until four years after the passage of the pre-emption act, and six years after settlement, and the act under which the complainants claim contained no such exception.

A further distinction widely separates the case of *Wilcox* v. *Jackson* from the case at bar, and effectually eliminates the former as an authority governing the latter. As stated the assignee of Beaubean claimed under the act of 1830. This act was passed six years *subsequent* to the formal reservation of the Fort Dearborn tract, while the Hackley heirs claim under the act of 1826,

which was passed four years *prior* to the reservation of Fort Brooke.

We further submit that the *dictum* of the court above quoted, even if it had the authority of a decision, would, when viewed in the light of the facts of the case, have no bearing upon this case.

It should be noted, also, that this is not a claim against the government, while all of the authorities cited, including those which we have cited in support of our position, involved a contest between the government and a private claimant. If the courts held against the government itself upon facts very much stronger in favor of reservation than those in this case, how much more readily should they support and establish a claim such as that of Hackley, and his legal representatives, in a contest between such claimants and subsequent settlers.

The government recognized that there was no reservation of this land prior to 1830, and on December 10th of that year an executive order was issued making such reservation.

The right of Robert J. Hackley must be tested by the conditions that existed at the time that the right vested, and not by conditions as they now appear. If in 1828, after the land office had been established, the troops had moved from the land in question, would any one have been so bold as to even suggest that under the act of 1826 Hackley could not have perfected his claim to said land? If his right was good in 1828, it has not been affected by the subsequent reservation or the occupancy of the government, which has simply delayed the enjoyment of the right.

U. S. v. *Fitzgerald,* 15 Peters, 419.

U. S. v. *Tichenor,* 12 Fed. Rep. 421.

It is submitted, therefore, that the mere occupancy of the land by the troops of the United States in a temporary camp or encampment, selected by a subordinate officer without specific orders from the President or Secretary of War, directing the occupation of the particular tract of land, as shown by the record in this case, could not constitute a military reservation, and could not give to the land any special character, or affect settlement rights thereon, further than to suspend the enjoyment of the right until the occupation ceased.

The real questions raised by the above specifications of demurrer for consideration are:

1. The Effect of the Occupancy of the Land in Question by the United States Troops from 1824 to 1830, and Subsequent Reservation in 1830, upon the Grant Made by the Act of 1826.

It is respectfully submitted that the occupancy of the land in question by the troops of the United States from 1824 to 1830 had no effect upon the rights of Robert J. Hackley under the act of 1826, further than to delay the perfection of that right and the enjoyment thereof, and that the effect of the subsequent reservation was the same. In other words, that the right or equitable title of Robert J. Hackley *vested upon the passage of the act of* 1826, but the *enjoyment* of that right and the *use of the land* was suspended during the occupation thereof by the government.

In another section of this brief we have established the contention that the act of 1826 was a grant *in presenti* to Hackley of an equitable interest in the land in question, which interest related back to the date of his settlement.

It is well settled that a grant *in presenti* may be made which will pass the interest or title sought to be conveyed, even though the land in question be occupied by the government or be in such a condition that the grantee cannot take immediate possession. The leading authorities upon this subject are those construing swamp and school grants, relating, in general terms, to lands of a given character or location. These grants pass the title to the State subject to occupancy, notwithstanding such reservation. The pre-emption act of 1826 passed an equitable title, and the principle underlying the two are the same.

In *Ham* v. *Missouri* (18 How., 126), the question of law involved was as to whether or not the school grant, under the act of March 6, 1820, for Missouri, was rendered inapplicable to certain land (thereafter in terms confirmed to the private land claimant by special act of Congress), by the proviso contained in the tenth section of the act of March 3, 1811, to the effect:

> "That till after the decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been in due time and according to law presented to the recorder of land titles in the District of Louisiana, and filed in his

office for the purpose of being investigated by the Commissioners appointed to ascertain the rights of persons claiming land in the Territory of Louisiana."

The court said (page 132):

"It may well be asked whether the language and objects of the latter can be made to import anything beyond a temporary suspension of the sales of the lands intended for sale, for the simple purpose of investigation; and much more, whether the tenth section of the act of 1811, and the proviso thereto, can be interpreted to mean a denial to itself by Congress of the right and power to sell or to give, either upon satisfactory evidence of the invalidity of any opposing claim, or upon considerations of public policy, the land embraced within the suspension.

"Such an interpretation, as it is not warranted by the language of the acts of Congress, seems not to accord either with considerations of justice or policy."

The court concluded that the provision for schools in the act of 1820 attached to the land, notwithstanding the legislative reservation, and that the title hereunder was paramount and superior to that sought to be granted to the private land claimant by an act of Congress passed subsequent thereto.

In *Beecher* v. *Wetherby* (95 U. S., 517), the question of law involved was whether or not the ownership of the lands by Indians under treaty at the date of the school land grant of August 6, 1846 (9 Stat. 56), and treaty reservation thereof for them at date of survey, inhibited the passage of the land under the grant. It was found by the court that by treaty of 1825 the land was recognized "as belonging to the Monomonee Tribe," which "embraced the section in controversy in this case;" that—

"In 1831, the same boundaries were again recognized. But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race."

As to the nature of the claims of the Indians, the court quoted from a former decision to show that:

> "The right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy. The possession, when abandoned by the Indians, attaches itself to the fee without further grant."

In the case of the *State of Michigan* (8 L. D., 308), it appeared that prior to the date of the grant the land had been reserved by executive order for the purpose of supplying fuel for the garrison at Fort Mackinaw, and so remained until after the act of July 5, 1884, in which express provision was made for the sale of the lands in said reservation, the proceeds therefrom being constituted a fund for a specific purpose. Though surveyed prior to the grant, the State did not select the land under the swamp land grant of 1850, until subsequent to said act of 1884.

The question was sharply presented before the department as to whether or not the reservation defeated the operation of the grant. After a most exhaustive discussion of the whole subject, the conclusion reached was that—

> "It is, therefore, not inconsistent with the theory of a grant *in presenti* that the full fee and present enjoyment of rights under the grant should be subject to a contingency."
>
> * * * * * * * *
>
> "The swamp land grant is a grant *in presenti* vesting in the State the fee simple to all lands of that description at the date of the passage of the act, subject to the use of the government or other uses for which a reservation is made, so long as that reservation shall continue."

This principle has been applied in numerous cases to different states of fact.

> See *State of Louisiana,* 17 L. D., 440.
> *State of Wisconsin,* 19 L. D., 518.
> *United States* v. *Thomas,* 151 U. S., 577.
> *Stockbridge and Menesee Indians* v. *Wisconsin,* 25 L. D., 17.
> *State of Florida,* 25 L. D., 117.
> *Morrow* v. *Whitney,* 95 U. S., 551.

These authorities establish beyond controversy the proposition, that when a right or title of this character is granted by Congress, it immediately vests in the grantee, although occupancy or enjoyment of the right may be delayed for a long period of time.

The authorities cited deal, to a large extent, with the vesting of legal title, but it need hardly be suggested that the vesting and enjoyment of an equitable interest or title is governed by the same principles. In this case the perfecting of the equitable interest into a legal title by proof and entry, and the enjoyments of the property was delayed or suspended until the land was recently restored to the public domain; but the act of 1826 being unlimited as to the time in which the rights therein given could be perfected, the vested right given to Robert J. Hackley and his legal representatives has been in nowise affected by this delay.

U. S. v. *Tichenor,* 12 Fed. Rep. 415.
U. S. v. *Johnson,* 2 Ch. of Cl. 391.

It is equally well settled that reservation declared by the government after the pre-emption right has accrued can in no way affect that right, though it may delay the enjoyment thereof.

Thus, in *United States* v. *Fitzgerald,* 15 Peters, 418, the Supreme Court said:

> "It cannot be contended that the land in controversy was reserved from sale by any act of Congress, or by order of the President, unless the direction of the Secretary to reserve it from sale, several months after it had been actually sold and paid for, could amount to such an order. *As no reservation or appropriation of the land made after the right of the defendants accrued under the act of the 19th of June,* 1834, *could defeat that right,* it is useless to inquire into the authority by which the Secretary of the Treasury attempted to make the reservation." (Italics ours.)

Morrow v. *Whitney,* 95 U. S., 551–556.

It is submitted, therefore—

(1) That the occupation of this land, prior to its reservation in 1830, did not affect its legal status as public land subject to the act of 1826.

(2) That the only effect of such occupation upon the rights of Hackley was to suspend the enjoyment thereof, and prevent the

perfecting of the equitable interest granted by the act into a complete legal title until such occupation terminated.

(3) That the formal reservation in 1830 could not affect the right of Hackley which had attached, further than to delay the perfecting and enjoyment thereof.

(4) That upon the termination of the reservation and occupation in 1883, the legal representatives of Hackley should have been permitted to perfect the right or interest granted by the act of 1826 into a legal title, in accordance with the provisions of said act, and the Interior Department and the court below erred in denying them this right.

VI. The Contention that Hackley Did Not and Could Not Perfect His Rights in Said Land During His Lifetime, and, Therefore, that Neither He, nor His Legal Representatives, Acquired Any Rights in or to the Same.

This contention is raised by section 4 of the joint demurrer (page —), which reads as follows:

> "It appears from the allegations of the complainants' bills, and from the exhibits attached thereto, that Robert J. Hackley did not, and could not, in his lifetime, conform to the requirements of section 1 of the act of Congress of April 22, 1826, and section 2 of the act of February 5, 1813, and, therefore, acquired no rights thereunder."

In this same connection we may also consider the fifth section of this demurrer (page —), which reads as follows:

> "Robert J. Hackley having failed to acquire any vested rights in and to the lands described in the complainants bills, at the time of his death he had no interest in the said lands which could descend to his heirs, the complainants herein."

These specifications or demurrer are based upon conclusions of law stated as facts, which conclusions are not sustained by the record, and are wholly denied.

We insist that Robert J. Hackley did, during his lifetime, comply with the provisions of the first section of the act of 1826, and with the second section of the act of 1813.

The first section of the act of 1826 only required that he should have settled upon and cultivated the land in question prior to the first of January, 1825, which settlement is found by the department to be a fact, and admitted by all parties.

The act of 1813, so far as applicable, only required that he should give notice of his claim two weeks before the beginning of public sales. We will discuss this question more at length under the subject of forfeiture. It is sufficient here to say that the record shows that Hackley did give notice, with proof of his claim, in 1835 to the Register and Receiver; and, in 1843,

and that his legal representatives again gave notice, describing the land by survey-lines after survey was made, in 1887. And no public sale of the land in question has been proclaimed by the President or made up to this time.

The real contention raised by these demurrers is that Hackley, by virtue of his settlement, acquired no such right or interest in the land, as would pass to his legal representatives or heirs-at-law.

We have already seen, however, that Hackley acquired, by virtue of the act of 1826, as construed by contemporaneous authorities, a vested right and equitable title to this land, which right or title would pass, as any other interest in real estate, to his heirs-at-law. But it is not necessary for us to establish this proposition, for the act itself grants the pre-emption right not only to the settler, but to his "legal representatives."

The term "legal representatives" has been construed by the Commissioner of the Land Office to mean representatives-in-law or heirs-at-law. Therefore, the act of 1826 gave to Hackley's legal representatives or heirs the same right which was granted Hackley himself, and it was not necessary that Hackley should prove his right during his lifetime in order that it might be acquired by his heirs.

The purpose of the law was obvious. It gave a pre-emption right to settlers upon unsurveyed lands in Florida, and, as contemporaneous records show, before these rights could be perfected after surveys, it frequently happened that the original settler was dead. The purpose of Congress was, that the right given to the original settler, and those who share the hardships with him, should not be lost simply because he died before it could be perfected. It will be found, therefore, that not only the act of 1826, but all of the early pre-emption acts giving the right of pre-emption as a reward for past settlement of cultivation, conferred the right not only upon the settler, but also upon his legal representatives as well.

The act of 1841, and subsequent acts, however, contained no such provision, for the obvious reason that future settlers were required to perform certain conditions precedent before they acquired any right.

In the opinion of the department, rendered in 1892, the Secretary bases his conclusion that Hackley acquired no right which could pass to his heirs upon the case of *Buxton* v. *Traver*, 130 U. S., 232, and this case is also relied upon by the demurrants. This case referred to a claim under the act of 1841, which only applied to surveyed lands, and gave pre-emption rights subject to conditions precedent, and contained no reference to "legal representatives." On the other hand, the act of 1826 is a grant to "every person, or the *legal representatives* of any person, who," etc. The act was as much a grant to the "legal representatives" of Hackley as to Hackley himself. It requires no discussion to show that the case of *Buxton* v. *Travers* could have no reference to cases arising under the act of 1826, which gave the right of pre-emption as a reward for past and executed consideration, and conferred the right in terms upon the "legal representatives" of a settler. The fact that the Interior Department utterly disregarded the terms of the act of 1826, and undertook to apply the case of *Buxton* v. *Travers* to a claim arising under that act is sufficient evidence of the character of investigation upon which that opinion was based.

In view of the terms of the act itself and the conditions surrounding its enactment, we do not feel that it is necessary to produce authorities to support our position on this point. To show the construction of the act as given by the department at the time, however, we furnish the following copies of final entry papers in two out of the many cases patented under the act of 1826 to the *heirs of settlers* who came within the terms of that act.

"No. 140. LAND OFFICE, *Dec.* 27, 1826.

"*It is hereby certified,* That, in pursuance of law, the heirs of Jno. Tanner, of Florida, on this day purchased of the register of this office, at Tallahassee, the lot or northwest quarter of section number thirty-three, of township number four north, in range number six west, containing 159.85 acres, at the rate of $1.25 per acre, amounting to $199.68¾, for which said heirs of Jno. Tanner has (have) made payment in full as required by law.

"*Now, therefore, be it known,* That on presentation of this certificate to the Commissioner of the General Land

Office the said heirs of John Tanner shall be entitled to receive a patent for the lot above described.

"G. W. WARD, *Register.*"

(Endorsed) "Pre-emption 140."

"No. 140. RECEIVER'S OFFICE AT TALLAHASSEE,

"*Dec.* 27, 1826.

"Received from the heirs of Jno. Tanner, of Fla., the sum of one hundred and ninety-nine dollars 68¾ cts., being in full for the northwest qr. of section 33, township 4, range 6, north and west, containing 159.75 acres, at the rate of $1.25 per acre.

"Dollars 199.68¾.

"R. K. CALL, *Receiver.*"

(Endorsed) "Pre-emption 140."

"No. 334. LAND OFFICE, *April* 6, 1827.

"It is hereby certified that, in pursuance of law, Cullen Edwards, heir of Shilo Edwards, of Florida, on this day purchased of the register of this office, at Tallahassee, the lot or east ½ of the N. west qr. of section number 2 of township number 2 north, in range number 4 west, containing 79.84 acres, at the rate of $1.25 per acre, amounting to 99.80, for which the said Cullen Edwards has made payment in full as required by law.

"Now, therefore, be it known that, on presentation of this certificate to the Commissioner of the General Land Office the said Cullen Edwards shall be entitled to receive a patent for the lot above described.

"G. W. WARD, *Register.*"

(Endorsed) P(re-emption) 334, Tallahassee, pat. dated September 1, 1827. Recorded vol. 4, page 406."

(Duplicate.)

"No. 334. RECEIVER'S OFFICE, *April* 6, 1826.

"Received from Cullen Edwards, heir of Shilo Edwards, the sum of $99.80, being in full for E. ½ of N. W. section No. 2, township 2, range No. 4, no. west, containing 79.84 acres, at the rate of $1.25 per acre, $99.80.

"R. K. CALL, *Receiver.*"

"(Endorsed) Pre-emption 334."

It is respectfully submitted, therefore—

(1) That Robert J. Hackley did perfect his pre-emption right during his lifetime, and did comply in every respect with the terms of the act under which he claimed.

(2) That Robert J. Hackley did acquire a vested right or equitable title to the land in question, which would have passed to his heirs as an interest in real estate, even if said heirs had not been mentioned in the act.

(3) That, by virtue of the terms of the act itself, the pre-emption right or interest is granted to the "legal representatives" of Hackley as well as to Hackley himself. And, therefore, any right given by that act may be perfected by them as well as it could have been by Hackley.

As the result of our review of the law and facts, and of the positions taken by counsel for the demurrants, on this branch of the case, we respectfully submit that the proposition, that Robert J. Hackley and his legal representatives acquired a vested right to or interest in said land by virtue of the settlement and cultivation thereof by said Hackley, and the provisions of the act of 1826, is clearly established.

Let us now see if said right has been forfeited "by failure to perform the conditions annexed to it."

SECTION II.

HAS THE RIGHT OF PRE-EMPTION, ACQUIRED, BEEN FORFEITED BY ROBERT J. HACKLEY AND HIS LEGAL REPRESENTATIVES?

This question is raised by specifications 7 and 8 of the joint demurrer, pp 80, 81, as follows:

> "It does not appear in and by the allegations of the complainants' bills that a declaratory statement was filed by the administrator of the estate of Robert J. Hackley, or by his heirs, within three months after the receipts and filing at the district land office of the approved plat of the township embracing the alleged pre-emption settlement, as required by sections 2266 and 2269 of the Revised Statutes of the United States, and the failure to file said declaratory statement within the time prescribed by the act of Congress was a forfeiture of any rights Robert J. Hackley, or his estate or heirs may have acquired by virtue of the alleged settlement upon said government lands.
>
> "It does not appear in and by the allegations of the complainants' bills that the administrator of the estate of Robert J. Hackley, deceased, or his heirs, made proper proof and payment for the land described and claimed therein within thirty months after the date prescribed therein respectively for filing their declaratory notices had expired, as required by sections 2267 and 2269, Revised Statutes of the United States, and a failure to make such proper proof and payment within the period required by the act of Congress was a forfeiture of any rights that might have been acquired by virtue of the alleged settlement of Robert J. Hackley upon said land."

The facts of this case bring the claim of R. J. Hackley clearly within the purview of the act of 1826, under which it is contended he acquired vested rights. This being true, we have to deal alone with conditions *subsequent,* as contradistinguished from the conditions *precedent,* imposed by the pre-emption law of 1841 and amendments thereto.

By these paragraphs of the demurrer, however, it is contended, on behalf of the demurrants, that the provisions of sections 2266,

2267 and 2269 of the Revised Statutes of the United States apply to the case at bar, and thus, by implication at least, it is claimed that the acts of 1826 and 1813 have been repealed or modified by subsequent statutes.

In the discussion of this branch of the case it is contended:

1. That the acts of 1826 and 1813 remain in full force and effect, and are in no sense modified or repealed by subsequent legislation.

2. That each and every one of the conditions *subsequent* imposed by the acts of 1826 and 1813, under which the right of pre-emption vested, have been fully complied with, by Hackley and his heirs.

3. That even should said sections of the Revised Statutes be held to apply to the case at bar, the extraordinary diligence exercised by the pre-emption claims has been such that all of the provisions of said sections have been fully complied with.

4. That no effort has ever been made, by or in behalf of the United States, to effect a forfeiture of the vested pre-emption rights of Hackley or his heirs, such action being necessary to defeat their rights.

5. That even were the conditions subsequent, as prescribed in said acts of 1826 and 1813, not complied with, no forfeiture of said vested rights could or can be exacted at the instance of the defendants.

I. Acts of 1826 and 1813 not Repealed or Modified.

As shown herein, the character of the rights acquired by the pre-emption claimants under the act of 1826 were of such a nature as to absolutely vest in R. J. Hackley and his heirs a right, founded upon prior settlement and occupancy of the land, which could not be divested, even by act of Congress itself, in the absence of failure to comply with the provisions with respect to the acquirement of legal title.

"When covered by law, it becomes a legal right, *subject to be defeated only by failure to perform the conditions annexed to it.*" (*Lytle* v. *Arkansas*, 9 How., 334.)

As will be seen, Congress has not attempted to make other disposition of the land in question, or even to modify in any par-

ticular the statutes under which title to the land is sought to be perfected.

The act of April 22, 1826, was not a general, but a special and local statute, section 1 thereof relating entirely to the Territory of Florida.

Under the well-established rules of construction, the sections of the Revised Statutes referred to by demurrants must be held to apply to cases under the *general act,* and cannot modify, restrict, or add *new conditions* to the local act of 1826, under which rights had vested.

> "When the legislator frames a statute in general terms, or treats a subject in a general manner, it is not reasonable to suppose that he intends to abrogate particular legislation, to the details of which he had previously given his attention, applicable only to a part of the same subject, unless the act shows a plain intention to do so." (Southernland on Statutes, sections 157, 158, Crow Dog.)

By references to sections 5595, 5596 and 5597 of the Revised Statutes, it will be seen that the revision and modification had relation to United States statutes "general and permanent in their nature"; and that the provisions for repeal are confined entirely to statutes embraced in some section of said revision:

> "Provided that the incorporation into said revision of any general and permanent provision taken from an act making appropriations, or from an act * * * containing other provisions of a private, *local,* or temporary character, shall not repeal or in any way affect any appropriation, or any provision of a private, *local,* or temporary character contained in any of said acts, but the same shall *remain in force;* and all acts of Congress passed prior to said last-named day (December 1, 1873), no part of which are embraced in said revision, *shall not be affected or changed by its enactment.*" (Italics ours.)
>
> "Section 5597. The repeal of the several acts embraced in said revision shall not affect any act done or *any right accruing or accrued,* or any suit or proceeding had or commenced, in any civil cause, before the said repeal, but all rights and liabilities under said acts shall continue and may be enforced in the same manner as if said repeal had not been made."

The acts of 1826 and 1813 were therefore not affected by or embraced in the codification of 1878, and the rights of the heirs of R. J. Hackley are in no way affected or governed by those sections of the general laws referred to by demurrants.

Indeed, by reference to these sections, as well as to the marginal notes with respect thereto, it will be readily discerned that they are based on the modern pre-emption system which had its beginning in the act of 1841, and was extended by the acts of March 3, 1843 (5th Stats., p. 620), and May 30, 1862 (12th Stat., p. 410).

The pre-emption claimants under the acts of 1826 and 1813 were not required to file declaratory statements, and the conditions prescribed by those laws are wholly *conditions subsequent.* As we have seen, the act of 1826 is one of those early statutes which were of a remedial nature, and passed for the expressed purpose of securing title to those who were *bona fide* occupants of and settlers on the public lands prior to the date of the statutes, before permitting the disposition of lands in the territory affected by general sales or otherwise. The Supreme Court of the United States in the case of *Moore* v. *Robbins,* 96 U. S., 530, held that it was by the act of September 4, 1841, that Congress "for the first time established the general principles of pre-emption, and which has remained the basis of that right to this day."

Any reference, therefore, in the Revised Statutes to pre-emption laws must be held to refer to the general act of 1841 and amendments thereto.

We respectfully submit, therefore, that the act of 1826 is still in force; that the provisions of the Revised Statutes referred to have no reference to rights acquired under that act; that the provisions of the sections relied upon by the demurrants were not "conditions annexed to" the "legal right" which vested in Hackley and his legal representatives in 1826, and cannot now be added to that act to defeat the rights given therein. We stand upon the declaration of the Supreme Court in *Lytle* v. *Arkansas,* that this pre-emption right can be defeated *"only* by failure to perform the *conditions annexed to it,"* and insist upon our rights being measured by the provisions of the act under which they vested.

II. The Acts of 1826 and 1813 Have Been Complied With.

Keeping these principles in mind, let us examine the *conditions subsequent,* provided in the statute of 1826, for failure to comply with which Hackley or his heirs could alone forfeit his or their rights in the premises.

The second section of the act of 1813, which contains the conditions imposed by the act of 1826, provides that—

> "Every person claiming a preference in becoming the purchaser of a tract of land in virtue of this act, shall make known his claim by delivering a notice in writing to the Register of the Land Office for the district in which the land may lie, wherein he shall designate the quarter section he claims, which notice the Register shall file in his office on receiving twenty-five cents from the person delivering the same. And in every case where it shall appear to the satisfaction of the Register and Receiver of Public Moneys of the Land Office, that any person, who has delivered his notice of claim, is entitled, according to the provisions of this act, to a preference in becoming the purchaser of a quarter section of land, such person so entitled shall have a right to enter the same with the Register of the Land Office on producing his receipt from the Receiver of Public Moneys for at least one-twentieth part of the purchase-money, as in the case of other public lands sold at private sale, provided that all lands to be sold under this act shall be entered with the Register at least *two weeks before the time of the commencement of public sales,* in the district wherein the land lies; and every person having the preference in becoming the purchaser of a tract of land, who shall *fail to make his entry with the Register within the time prescribed, his rights shall be forfeited,* and the land by him claimed shall be offered at public sale with other public lands in the district to which it belongs." (Italics ours.)

An analysis of this section will show that there were but two conditions imposed upon the pre-emptor:

First. He should make known his claim by delivering a *notice in writing* to the Register of the Land Office in the district in which the land may be, designating the quarter section he claims.

Second. He shall, after it shall appear to the satisfaction of the Register and Receiver that he is entitled under the act, enter

the land with the Register at least *two weeks* before the time of *commencement of the public sales* in the district wherein the land lies, producing his receipt from the Receiver for a one-twentieth part of the purchase-price.

By the previous act of March 31, 1808 (Revised Stat., 2359), it will be seen that no public sales could be made without advertisement of from three to six months prior to the date of sale. So that the limitations prescribed by the act of 1813, made applicable to Florida by the act of 1826, were based upon ample notice of such public sales, so as to give the pre-emptor the opportunity to make entry before his rights could be barred.

It will be noticed that the act of 1826 placed *no limit* upon the time within which the right therein could be perfected, except as to lands offered for public sale, and the department has held time and again that where the act placed no limit it could place none.

On August 23, 1830, Attorney-General Berrien (Att'y-Gens'. Opins., p. 779), in discussing the provisions of the act of 1830, which was similar to the act of 1826 (except that it reserved certain lands from the operation of the act, expressly inhibited the assignment of rights and limited its operation to a period of one year, while in the act of 1826 there were no reservations or limitations), says:

> "Here is an unqualified right of entry to all persons who had the possession, and who made the cultivation required by the act, which right of entry, so far as this section provides, is *unlimited as to time,* while the act which confers it imposes upon the person claiming it *no* obligation to give notice of his claim." (Italics ours.)

In discussing the provisions of that act in detail, he says with respect to the pre-emption right:

> "Subject to these exceptions, it is an unqualified right, and its exercise *is not restricted as to time,* except in case of *lands offered for sale* under the proclamation of the President, in regard to which it is limited by the time appointed for the commencement of the sales, and in relation to all others by the *duration of the act.*" (Italics ours.)

In *Lytle* v. *Arkansas,* 9 Howard, 344, the Supreme Court,

speaking of the pre-emption right conferred by the act of 1830, says:

> "But when covered by law it becomes a legal right, subject to be defeated *only by failure to perform the conditions annexed to it.*" (Italics ours.)

We have seen by an examination of the statute, and the construction of a similar statute by the Attorney-General, that the only two conditions required of Hackley by this act were to *give notice to the Register of his claim,* which notice should be given at *least two weeks before the beginning of public sales.* It further appears that there is *no limitation* upon the time within which he could give this notice, except the limitation as to the *beginning of public sales.* The decision of Secretary Smith, Exhibit "J," p. 59, to the bill, contains the following:

> "Under the authority vested in the Commissioner of the General Land Office by the acts of 1846 and 1856, and by section 2364 of the Revised Statutes, he might have brought into the market and disposed of the same at public auction the lands included in Fort Brooke Military Reservation; but he was not compelled to do so, and *up to this time has made no effort to have the same disposed of in that manner.*" (Italics ours.)

The time, therefore, within which Hackley or his legal representatives could perfect their claim of record, as required by the statute, *has never yet elapsed.*

It also appears from the decision of the Honorable Secretary of the Interior, as a finding of fact accepted as true by the bill and admitted by the demurrants, that the approved plat of survey of the land in controversy was not filed in the local land office at Gainesville, Fla., until March 22, 1883, and "that on April 2d thereafter said officers were directed to allow no entries on any land within said reservation." (Pp. 56, 57.)

It also appears by the decision (page 63) that this order of suspension remained in force until revoked by this decision of the Secretary under date of July 24, 1894.

In this connection attention is called to the fact that the act of 1826 differed further from the act of 1830, in that the act of 1830 was limited in its operations to one year from the date

thereof. It being impracticable to make proof and payment in advance of the filing of the plat of governmental survey, Congress, by the act of July 14, 1832 (4th Stat., 603), extended the provisions of said act; and thereafter, for the same reason, the provisions of the act of 1830 and of 1832 were further extended by the act of 1834, the first section of which reads as follows:

> "That all the occupants and settlers upon the public lands of the United States, who are entitled to a pre-emption according to the provisions of an act of Congress approved on the twenty-ninth of May, 1830, and who have not then, or shall not be enabled to make proof and enter the same within the time limited in said act, *in consequence of the public surveys not having been made and returned,* or where the land was not attached to any land district . . . . . the land occupants shall be permitted to enter the said lands upon the same conditions in every respect as are prescribed in said act, within one year *after the surveys are made,* or the lands attached to a land district, or the boundary line established; and if the said lands shall be proclaimed for sale before the expiration of one years, as aforesaid, when they shall be entered before the sale thereof."

Under date of June 19, 1832 (Vol. 2, Public Land Laws, p. 556), in instructions to the Register and Receiver at Mount Salus, Miss., the Commissioner of the General Land Office clearly states that notice shall be given of the receipt of plats before a pre-emptor shall be required to proceed to perfect his claim. And in instructions of February 8, 1832 (Public Land Laws, p. 559), to the Register and Receiver at Springfield, Ill., the Commissioner held that even where plats were received, the recording of the land as subject to private entry where there had been failure on the part of the pre-emptor to proceed, was confined to lands which had been *actually offered for sale.*

By postscript to general circular dated October 11, 1837 (Public Land Laws, p. 652), to the Registers and Receivers, general instructions were given by the Land Department, as follows:

> "And from time to time hereafter, whenever plats are received at your office (the date of such receipt to be noted on the face of the plat), you are required to give public notice of the fact through the most convenient newspaper,

> and request claimants to pre-emption rights to file their testimony and complete their payments."

The instructions last quoted doubtless had relation to the public notice required before pre-emption claimants could be expected to perfect their claim in local land offices, under the acts of 1826 and 1813, and as well as those under intervening acts; and while the statutes of 1830 and 1832, expressly limiting pre-emption claimants to one year after the passage thereof within which to perfect their claims, do not necessarily apply to the claimants under the act of 1826, it is interesting to note the course pursued by Congress with respect to these later acts, which renders incontrovertible the contention that there was *no restriction* as to the *time required* for the perfection of pre-emption claims under the act of 1826, anterior to a proclamation of the President *fixing the date for public sale in the district embracing the lands covered by such claims.* Pre-emption claimants under the act of 1826 could not be expected, any more than those under the acts of 1830, 1832 and 1834, to describe their lands according to survey, calculate the amount of money required to be tendered by means of the acreage of land to be shown by the plat of survey, before the approval of such plat and its filing in the local office.

Both the department and the courts, by contemporaneous construction, recognized that a notice substantially describing the land claimed, where the same had not been surveyed, was a sufficient compliance with the act. Thus, in a communication from the Commissioner to the Register and Receiver at Palmyra, Mo., September 21, 1824, relative to claims under the act of April 12, 1814 (5 Stats., p. 122), section five of which was in the same terms of the act of 1826, it is said:

> "When applications are made to enter pre-emptions previous to the surveying of the lands, and there is apprehension of loss of testimony by death or otherwise, you will permit the right of entry to be established, and the *payment* and *entry* could be made *after the surveys were returned.*" (Italics ours.)

Lytle v. *Arkansas,* 9 How., 334, it was urged against the claim of Cloyes that no proof had been made since survey, his notice

and proof having been given before 1831, and surveys not having been made until 1833. In discussing this point the court said:

> "Under those acts Cloyes was only required to do what was necessary to perfect his right. But those steps within the law which had been taken were not required to be taken again.
>
> "It is well-established principle that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him. In this case, the pre-emptive right of Cloyes having been proved, and an offer to pay the money for land claimed by him, under the act of 1830, nothing more could be done by him, and nothing more could be required of him under that act. And subsequently, when he paid the money to the Receiver, under subsequent acts, the surveys being returned, he could do nothing more than offer to enter the fractions, which the Register would not permit him to do. This claim of pre-emption stands before us in a light not less favorable than it would have stood if Cloyes, or his representatives, had been permitted by the land officers to do what, in this respect, was offered to be done."

We will now show that Hackley, during his life-time, fully complied with the terms of the statute, as construed by the Commissioner, and by the Supreme Court of the United States, and that his legal representatives, after survey of the land, fully complied with the letter of its provisions, by giving notice, describing the land in accordance with the survey-lines, and tendering the full purchase price therefor.

We have seen that the Land Office for the district in which the land was located was not established until 1828, and the bill alleges that as soon as communication with said Land Office was practicable, to-wit, in the year 1835, Hackley filed with the Register and Receiver a written notice, *designating in an intelligible manner* the land which he claimed, and submitting therewith the *evidence of his claim.* This in itself constituted compliance with the requirements of the act of 1826, as far as possible in advance of governmental survey, and constituted a valid, actual notice of his pre-emption claim under the statute. As shown by the authorities cited under the practice at that time, where land

had not been surveyed, a notice of this character was accepted as a compliance with the act.

But Hackley did not stop here. In 1843, when the Land Office at Newnansville was opened, he secured from the Land Office at St. Augustine certified copies of the *evidence of his claim*, and filed with the Register and Receiver at Newnansville another *notice* (page 9), which read as follows:

> "SIR: You will take notice that I claim the right of pre-emption of a tract of land known as Cantonment Brooke, Bay of Tampa, under the pre-emption act approved April 22, 1826, and that I have filed proof of the same in the Register's Office at St. Augustine."

Here was another notice, which constituted a compliance with the requirements of section 2 of the act of 1813.

Thereafter, in the year 1845, Mr. Hackley died in Florida, where he had continuously resided; but his legal representatives have continuously asserted the pre-emption claim, so initiated and proven, unto the present time. The land was included in the Fort Brooke Military Reservation by executive order of 1830, and remained unsurveyed until 1883. As heretofore shown, within ten days after the plat had been filed in the Local Land Office, entry thereof was prohibited by order of the Commissioner of the General Land Office, and said plat was suspended, and remained so until revoked by the Secretary of the Interior in his decision of 1894.

The plat having been suspended before the expiration of the time allowed them to perfect their claim under the act of 1826 and 1813, the heirs of Hackley waited for the revocation of said order of suspension in order to further press their claim until October 14, 1887, when they *filed a further notice of their claim* to the right of pre-emption and purchase of said land through their agent, T. H. Randolph, who also *applied to enter* said land according to the official survey for the heirs of Robert J. Hackley and as administrator of his estate, *and tendered therefor the purchase price.*

Here was a complete and absolute compliance with the letter of the second section of the act of 1813, not only giving notice of lands, but describing exactly, *by survey, the lines and location*

of the land which was claimed. That notice, too, was given more than two weeks before any public sale of this land, for, as before shown, *it has never been offered at public sale.*

The application and tender were rejected by the Register and Receiver, not upon the ground of any defect in the claims of said Hackley, but upon the ground that the land was then a part of *Fort Brooke Reservation,* and not subject to entry, the plats being still suspended by the order of the Commissioner dated April 2, 1883.

We are unable to see what further could have been done by either Hackley or his heirs to comply with the requirements of the law, or upon what ground it could possibly be claimed that their rights under the act of 1826 were forfeited for failure to comply with the conditions *subsequent.*

The Register and Receiver, the Commissioner of the General Land Office, and two Secretaries of the Interior have passed upon this subject, and have all found as a fact that Hackley did comply with the requirements of the acts of 1826 and 1813. The Register and Receiver, in their opinion, which is made a part of the opinion of the Commissioner (Exhibit "G," pp. 27, 28) found that—

> "Hackley made entry in good faith, and for the purpose of securing a home under the provisions of the acts of 1813 and 1826, then in force, and we consider his claim superior, in the absence of an adverse claim, to the claims made after the abandonment of the fort in 1883."

They also (page 28) say:

> "Inasmuch as the widow and heirs of Hackley have continued to prosecute their claims for the right to purchase the abandoned reservation, we believe that their claim is entitled to serious consideration."

The Commissioner, in his decision (page 34), states, with reference to Hackley's claim:

> "He appears, in fact, to be the first white man who ever lived on the land. He unquestionably is fully protected by the act of 1826, and the act of 1858, and that of July 5, 1884. He meets the requirements of the first proviso of the second section of the latter act."

In thus deciding in favor of Hackley's claim, the Register and Receiver and the Commissioner necessarily found that he had complied with the provisions of the act under which he claimed, and their findings of fact upon this subject were adopted and approved by each of the Secretaries of the Interior, who passed upon the question.

The acts of 1826 and 1813 have been fully and completely complied with by R. J. Hackley and his legal representatives.

III. The Revised Statutes Have Been Complied With.

As shown above, sections 2266 and 2269 of the Revised Statutes in no way modify or repeal the acts of 1826 and 1813, and do not apply to the character of pre-emptions involved in these suits, and we insist, for reasons already given, that they have absolutely no bearing upon this case. But it is submitted that, even should the same be held to apply to the case at bar, their requirements have been fully met.

Demurrants contend that the legal representatives must have filed a declaratory statement, as required by said sections, within three months after the receipt of the approved plat by the Register and Receiver, and must also have made proper proof and payment within thirty months from the date prescribed therein. As suggested above, the first reference in any land laws to the declaratory statement is found in the *act of* 1841, and it is simply a form of public notice for the protection of subsequent settlers, like our recordation acts.

It will readily be seen from the authorities cited, both in behalf of the complainants and the demurrants, that declaratory statements required by the act of 1841 could not be filed until after the lands were surveyed; and, indeed, it was not until the passage of the act of 1862 that a pre-emptor, under the general pre-emption system, could initiate a right as against the United States to unsurveyed land, although it has always been the practice, as between individuals, to award to settlers preference right of entry, according to the relative dates at which they severally settled upon the public lands in good faith for the purpose of eventually acquiring title under the pre-emption laws.

Frisbie v. *Whitney*, 9 Wall., 187.

The earliest time at which the filing of a declaratory statement was required by any law was three months after the plat of survey had been approved and filed in the local office.

The object of the declaratory statement was primarily to give notice to other settlers of the claim.

At any time subsequent to the date at which a plat of survey was filed, a *suspension* of such plat or of the land from entry has always operated as a *stay* of proceedings during the *period* of such *suspension*, and this is true also in the matter of computing the time within which final proof is required by the statute to be made in pursuance of the pre-emption laws under the general system as inaugurated under the act of 1841.

In this particular, the pre-emption law is similar to the homestead law, also founded solely upon conditions precedent, and authorities on the subject of stay in the running of time pending suspension as to homestead cases apply as well to those involving a pre-emption claim of the character contemplated by the act of 1841, and subsequent statutes incorporated into said sections of the Revised Statutes.

Lambert v. *Lambert*, 21 L. D., 169.
Albert H. Hooper, 12 L. D., 633.
Smith v. *Lochran*, 22 L. D., 578.
Beley v. *Cooke*, 15 L. D., 215.
Ludwig May case, 13 L. D., 297.
Mather et al v. *Hackley Heirs*, 19 L. D., p. 48.

In the case of *Lambert* v. *Lambert*, *supra*, it was held (syllabus):

> "The statutory period within which proof should be submitted under a homestead entry does not run during the pendency of an order suspending the final survey of the land."

In this case application to make final proof was not made until over a year and a half after the expiration of the seven years within which final proof was required by the statute to be made.

In the case of Hooper, *supra*, it is held (syllabus):

> "Final proof should not be accepted while the survey of the township in which the land is situated is suspended for investigation."

In the pre-emption case of May, *supra,* it is held (syllabus) that—

> "An entry made while the township plat is on file is not annulled by the subsequent withdrawal of said plat, but *suspended during said withdrawal.*" (Italics supplied.)

In the case of *Beley* v. *Cooke, supra,* it is held (syllabus):

> "The suspension of the township plat pending the settlement of a private claim excuses a homesteader during the period of suspension from establishing a residence under an entry made prior to the order of suspension."

In the case of *Mather et al* v. *Hackley heirs* (*supra*), *in the very decision under which the defendants claim,* this doctrine is recognized and followed. As stated, the plat was filed March 22d, and suspended by order of the Commissioner of April 2, 1883. Mr. Secretary Smith (pages 63 and 64) said:

> "The claims of Julius Cæsar, . . . Martha Stillings, wife and heir of Andrew Stillings, deceased, . . . and that of Frank Jones . . . are in the same condition as that of Louis Bell, with the exception that said claims were not asserted until subsequent to the date of the order from your (Commissioner's) office directing that no entries be allowed upon the land of said reservation.
>
> "The settlement rights of Cæsar, Stillings and Jones had attached prior to the date of said order, and *were simply held in abeyance* by it." (Italics ours.)

It will thus be seen that, even under sections 2266 and 2269 of the Revised Statutes, the contention of demurrants must fall, as but ten days elapsed from the date of the filing of the approved plat until the date of the suspension thereof, and the Hackley heirs had remaining to their credit a period of eighty days within which to file said statement, and twenty-nine months and twenty days within which to make final proof, even if they had not already filed a valid declaratory statement within the purview of said sections of the Revised Statutes.

It is contended, therefore, that the character of the notice given by the administrator of Robert J. Hackley in behalf of his heirs, in October, 1887, drawn as it was in the light of the acts of 1826 and 1813, as well as the provisions of sections 2266 and

2269 of the Revised Statutes, is sufficiently broad to meet every requirement of the act of 1841, and said sections of the Revised Statutes, insisting always, however, that these statutes can have no bearing upon this case, because the "legal right" of Hackley and his legal representatives could only be forfeited for failure to perform the "*conditions annexed to it.*"

Authorities Cited by Demurrants.

Demurrants have cited cases which arose under the pre-emption system inaugurated in 1841, and which relate to cases in which there was such a different state of facts as to be utterly inapplicable to the case at bar, even though the Hackley claim should have to stand or fall upon sections 2266 and 2269 of the Revised Statutes, which sections we earnestly insist have nothing whatever to do with this case.

In the case of *Lansdale* v. *Daniel,* 100 U. S., 113, the declaratory statement was filed by defendant prior to the time at which the land became subject to entry, and was declared to be a nullity, while the plaintiff in that case did not file his declaratory statement for some two years after the land became subject to entry. The court said:

> "The rule is otherwise where it is filed subsequent to the period prescribed by the amendatory act, as, in the latter event, it is held to be operative and sufficient unless some other person had previously commenced a settlement and given the required notice of claim."

In this case it will be seen that there was no question of suspension.

In the case of the *Northern Pacific Railway Company* v. *DeLacey,* 174 U. S., 631, the sole question involved was whether or not the declaratory statement made by one John Fleet for land within the primary limits of the grant to said railroad under date of April 9, 1869, served to except the land from the attachment of the right of the road thereto upon the filing of the map of definite location on March 26, 1884. In this case there was no question as to the fact that prior to the date of the filing the land had been surveyed, and all the necessary steps had been taken to render the land subject to entry. This suit was in ejectment by

the plaintiff company, to which patent had been issued by the Land Department in 1892, and the defendant in possession was defending upon what he conceived to be the weakness of his adversaries' title, the questions of fact in the case having been finally decided by the Land Department in 1891. By reference to the departmental decision as to the facts (evidently a part of the record before the court) as reported in 13 L. D., at page 617, it will be seen that the defendant, DeLacey, who was a homesteader, had initiated his claim in 1886, about two years subsequent to the attaching of the railroad's claim on definite location.

The department further found as a fact that—

> "The testimony shows beyond all question that Fleet had abandoned the land on May 14, 1874, when the road was definitely located, and at that time he was cultivating and improving the tract embraced in his homestead entry, made prior to said date of definite location. . . . .
>
> "Considering that his homestead entry was equivalent to the relinquishment of his pre-emption filing, and was of itself an act of abandonment of the land covered by such filing, I do not deem it necessary to consider the other points argued by counsel; to-wit, that Fleet was disqualified from making a pre-emption entry by reason of having previously received patents for 320 acres under the Oregon Donation act."

It further appeared, both in the decision of the Land Department and the findings by the court, that Fleet, in 1870, had acquiesced in the decision of the local officers to the effect that the tract covered by D. S. filing was railroad land, and "he had lost it"; and it was not until September 7, 1887, nearly eighteen years after the date of his filing, that he submitted final proof.

It will thus appear that the decision of the Supreme Court in this case has no application to the case at bar, in that it was based upon the pre-emption system, as inaugurated in and subsequent to 1841, and is a case where there was neither suspension of plat nor entry to excuse the performance of the condition *precedent* imposed by the general pre-emption law.

The case of *Gonzales* v. *French*, 164 U. S., 338, is a suit in equity, to declare a trust, instituted by the plaintiff against the defendant as the probate judge, to whom patent issued for the

benefit of the town under special act of Congress, approved February 3, 1899, under which act land reserved for school purposes in said territory could be appropriated for town purposes. The plaintiff claims as assignee of a pre-emption settler on unsurveyed land. The land when surveyed proved to be in section 16, and was, therefore, reserved for schools. The land was surveyed in 1878, but the plat thereof was not approved and filed in the local office until February 3, 1879. Thereafter, in June, 1883, plaintiff bought improvements of occupants and took possession. On April 2, 1885, she made application to the local land offices, and filed pre-emption declaratory statement and tendered proper fees; her application was rejected on the ground that the land was reserved for school purposes. She acquiesced in this decision, and "took no further steps until July 20, 1889, when she ineffectually opposed the claim of the probate judge in making his entry" under the special statute mentioned. The Supreme Court sustained the decision of the Supreme Court of the territory to the effect that—

> "The land in question was never divested of its character as school land until the entry by the probate judge under the act of 1889."

The person from whom the plaintiff purchased improvements never placed any claim for the land of record whatsoever, and there appears to have been no suspension of the plat. This case, therefore, is clearly inapplicable to the case at bar.

In the case of *Moore* v. *Robbins,* 96 U. S., page 530, the question under consideration by the Supreme Court of the United States was the relative rights of those claiming under the public sales made in pursuance of a proclamation of the President, and those claiming under the person who apparently did not initiate his pre-emption claim of record until more than three months from the date of his alleged settlement, and the commencement of the public sales, and who did not tender any money in payment for the land until three months *after such public sale* was actually made. The Supreme Court held (syllabus) that:

> "Under section 14 *of the act of* 1841 (5 Stats., 457) and the act of *March* 3, 1853 (10 Stats., 244), no pre-emption claim was of any avail against a purchaser of the land *at the*

> *public sales ordered by the proclamation of the President,* unless before they commenced, the claimant had proved up his settlement and paid for the land." (Italics ours.)

This case, of course, is inapplicable to the case at bar in that the pre-emption claimant is claiming under a different law. Bunn presumably had the requisite notice and time, and failed to make both proof and payment until after public sale. As stated in the *case at bar,* the lands have *never yet been offered at public sale.*

The case of *Atherton* v. *Fowler,* 96 U. S., page 513, and cited by counsel, has been hereinbefore distinguished. It presents no question pertinent to this phase of the case, and the same is true with the case of *Johnson* v. *Tousley,* also cited.

It will be seen, therefore, that while the case at bar does not come within the purview of sections 2266, 2267 and 2269 of the Revised Statutes, the course pursued by Robert J. Hackley and his legal representatives has been such as that each of these very provisions of said statutes have been fully complied with, were such compliance necessary.

IV. The United States Never Attempted to Exact Forfeiture.

There can be no question of the fact that upon the passage of the act of 1826, there became vested in Robert J. Hackley and his legal representatives, a right of pre-emption which could not be divested except upon "forfeiture," duly enforced for failure to perform conditions subsequent, as specifically set forth in section 2 of the act of 1813. It has been shown that no one of these conditions have been broken, but, on the contrary, they have been fully performed, both in letter and in spirit, by the pre-emptor and his legal representatives. But even if this were not the case, it is a well-established principle of law that there must needs be some actual and proper action taken by the grantor before forfeiture can be effected of vested rights.

In this case there has been an utter failure on the part of the grantor, the United States, to take any action whatsoever looking to the exaction of a forfeiture. On the contrary, the pre-emption right of Hackley and those claiming through him was never adjudicated until the decisions of the Register and Receiver in

1889, of the Commissioner in 1890, and the Secretary of the Interior in 1892 and 1894. Both the Register and Receiver and the Commissioner held that Hackley's rights vested under the act of 1826, and that each and every one of the conditions subsequent had been duly complied with by the pre-emptor and his legal representatives.

In rejecting the Hackley claim, the Secretary of the Interior did not overrule the findings of fact by the Register and Receiver or the Commissioner of the General Land Office as to the acts performed by Hackley and his heirs in their efforts to acquire title to the land in question, but decided as a conclusion of law that the land itself was never in such condition as to enable Hackley to initiate a valid claim to it under the acts of 1826 and 1813. The only question, therefore, is between individual claimants. The United States claims no forfeiture.

It is a well-established principle of law that the exaction of a forfeiture for non-performance of conditions subsequent is not within the jurisdiction of the Secretary of the Interior.

> "The mode of asserting or resuming the forfeited grant is subject to the legislative authority of the government."

Since the opinion of the Attorney-General of the United States in the case of the Atlantic and Pacific Railroad Company land grant (XVI. Atty. Gen. Ops., 572), it has been uniformly held that the Secretary of the Interior has no authority to declare a forfeiture. On the contrary, even in the face of direct and unequivocal acts of forfeiture the department proceeds to convey legal titles in the *absence of legislative action,* looking to the exaction of forfeitures. In this opinion the Attorney-General said:

> "I am, therefore, of opinion that the grant to the railroad had been forfeited by failure to build its road within the time named in the act, no action, by reason of its failure to perform the conditions, having been taken by authority of Congress. It being, then, a present grant, even if it be treated as one liable to forfeiture, it has still a right to proceed to construct the road, and until in some form advantage shall be taken of the conditions, it would be the duty of the Executive Department to give it the benefit of the grant."

But even should it be held that the conditions subsequent im-

It is respectfully submitted, therefore:

(1) That the acts of 1826 and 1813 remain in full force, in no way modified by subsequent *general* legislation, and that the "legal right" which vested in Hackley and his legal representatives upon the passage of the act of 1826, could only be defeated by the failure to perform the "conditions annexed to it," followed by some act enforcing forfeiture on the part of the government.

(2) That Robert J. Hackley fully complied with the conditions contained in the acts above mentioned by his notice and proof in 1835 and 1843, and that his legal representatives complied with the letter and terms of said acts by their notice, given in 1887, accompanied by application to enter, and a tender of the full purchase-price.

(3) That even if the sections of the Revised Statutes relied upon had any application to this case (which we insist they have not), the complainants have fully complied with their provisions by the notice or declaratory statement, filed in 1887, before the time provided by such statutes had elapsed.

(4) That there has never been any action on the part of the government looking to the forfeiture of the right of Hackley, or his legal representatives; but, to the contrary, the Register and Receiver and Commissioner, decided in favor of the Hackley heirs, and the Secretaries of the Interior only rejected their claims for legal reasons, in no way connected with the forfeiture.

(5) That the question of forfeiture cannot be involved in this case for the reason that it is a contest between individuals, in which the government is not interested, and even if Hackley, or his legal representatives, had failed to comply with the conditions subsequent named in the acts, the demurrants could not take advantage of their failure.

For these reasons it is submitted that the demurrer under discussion upon this branch of the case are not well taken.

PART II.

OF THE TECHNICAL GROUNDS OF DEMURRER.

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OF THE TECHNICAL GROUNDS OF DEMURRER.

I. Want of Specific Allegation of Error in Construction of Law by the Interior Department.

This ground of demurrer is expressed in section 12 of the joint and several demurrer filed by the defendants other than Finley, p. 81, as follows:

> "There is no specific allegation of error of construction of law in complainants' bills, and in the absence of such specific allegation this suit cannot be maintained, and complainants' bills should be dismissed."

While satisfied that the bill as originally filed was not defective, as contended by this specification of demurrer, yet, to relieve the case of the possible objections of this ground and any complication which might be avoided, complainants, by leave of the court, amended the bill as appears, pages 86 and 87, by inserting the averment that "the said decision of the Secretary of the Interior awarding the right to enter said lands as aforesaid was based upon erroneous conclusions of law."

We would add in this connection, however, that in the bill under consideration the complainants set out first in detail their title and interest, the statutes and the facts upon which they base their claim. They set out the finding of the facts by the different officers of the Interior Department, beginning with the Register and Receiver, and filed the opinions of these officers (as exhibits) as a more complete statement of the facts as found, praying that they may be taken as a part of the bill; that the Secretary of the

Interior, after approving the finding of the facts as made by the Register and Receiver, and Commissioner of the General Land Office, in so far as they affect the rights of the complainants, held upon conclusions of law adversely to the complainants. Copies of the decisions of the officers of the Land Department are in each instance attached as exhibits to and made a part of the bill of complaint. The bill alleges that, upon the law and facts as set out, the complainants were entitled to this land, and that they are the equitable owners of the same, but that the Interior Department upon erroneous conclusions of law issued patents to the defendants.

The distinction should be carefully drawn between the class of suits to which the cases under consideration belong, and those suits which are brought by the government to cancel, annul or set aside a patent. In the latter cases (upon which the demurrants rely) the basis of the action is fraud or mistake of law. The government—the plaintiff—does not rely upon its *original title* or original right, but rather upon the *fraud* or *mistake,* and, therefore, not only facts which show fraud or mistake must be alleged, but there must be a specific allegation of fraud or mistake, as this is the basis of the action. In this class of cases there is no claim by virtue of an error in the construction of law, as in the case at bar, in which complainants rely upon their original right to the land under the law, and pray that this right may be protected and perfected by requiring a conveyance of the legal title which has been transferred to some one else in violation of their rights. It is only necessary, therefore, to the action to allege such law and *facts* as show that their right is superior to that of the patentees, and that they are indeed entitled, under the law, to the land, and when the court will, in protection of that right, require the conveyance of the legal title. If it appears upon the face of the bill that the complainants have a right to the land, it necessarily follows that the department committed an error of law (the facts being admitted) in issuing the patents to the defendants.

The authorities cited in the court below by counsel for the demurrants upon this point, and upon the kindred subject of *res adjudicata* next considered by us, do not in any way militate against the position taken by us. This is so apparent that we

deem an extensive and detailed review of them in this brief unnecessary. Many of these cases are suits by the United States to set aside patents for fraud, which, as we have seen, proceed upon an entirely different principle. See *U. S.* v. *Atherton,* 102 U. S., 372. Others are cases where the decisions of the department are not filed, and the allegations were not sufficient to enable the court to ascertain from the record whether there was an error in the construction of law or not. For example see *Marquiz* v. *Frisbee,* 108 U. S., 478. Where the authorities cited apply at all, they support rather than negative our contention.

As an illustration of this we quote from the opinion of Mr. Justice Field in the leading case of *Lee* v. *Johnson,* 116 U. S., 48:

> "The defendant in the court below, the plaintiff in error here, is the holder of a patent of the United States for a parcel of land in Michigan issued to him under the homestead laws, and the present suit was brought to charge him, as trustee of the property, and to compel a conveyance to the plaintiff. The patent having been issued by officers of the Land Department, to whose supervision and control are entrusted the various proceedings required for the alienation of the public lands, all reasonable presumptions are indulged in support of their action. It cannot be attacked collaterally, but only by a direct proceeding instituted by the government or by parties acting in its name and by its authority. If, however, those officers mistake the law applicable to the facts, or misconstrue the statutes and issue a patent to one not entitled to it, the party wronged can resort to a court of equity to correct the mistake and compel the transfer of the legal title to him as the true owner. *The court in such a case merely directs that to be done which those officers would have done if no error of law had been committed.*" (Italics ours.)

In the case at bar we are only asking the court to do what, in our view of the law, the Interior Department should have done, to-wit, to protect the right of the complainants, a right not based upon any *error* or *fraud,* but upon the original settlement of their decedent and the act of 1826.

II. Objection that the Matters in Issue, Having Been Decided by the Interior Department, are now Res Judicata.

This objection appears in the last specification of the demurrer of S. Y. Finley, page 84, as follows:

> "7th. Because the complainants' said bill and exhibits show that the Land Department of the United States has fully and finally adjudicated the matter set up in said bill, and said bill does not state facts sufficient to authorize a court of equity to review the said decision of the Land Department of the United States."

The objection is found in section 9 in the joint and several demurrer, page 81, as follows:

> "The Secretary of the Interior having decided that Robert J. Hackley, his heirs and legal representatives, had not conformed to the provisions of the act of Congress of the United States prescribing the requirements for the acquiring pre-emption rights therein, and the same being a mixed question of law and of fact, said decision of the said Secretary became final and cannot be reviewed by the courts."

It is submitted that this ground of objection is bad in that it constitutes a "speaking demurrer" by attempting to set up a fact as a basis for the objection, which does not appear upon the face of the bills and exhibits; but, on the contrary, is positively negatived by the allegations of the bills to which the demurrers are filed.

Shipman's Eq. Pl., p. 373.
Stewartson v. *Masterson*, 131 U. S., 151.

An examination of the bill and exhibits will show that nowhere does it appear that the Secretary of the Interior had decided that Hackley or his heirs and legal representatives had not conformed to the provisions of the act of Congress of the United States prescribing the requirements for acquiring of pre-emption rights in said land.

In the decision of the Commissioner of the General Land Office, rendered on December 10, 1890, filed as Exhibit "G," the Com-

missioner adopts in express terms the finding of facts as made by the Register and Receiver, making the opinion of those officers a part of his decision. At Record, page 27, in considering the claim of the Hackley heirs, after finding that Hackley made settlement upon the land, as contended in his behalf, and after setting out Hackley's claim, the Commissioner finds that he at all times up to his death contended that under the acts of 1813 and 1826 his prior right to purchase the land could not be questioned, whenever the reservation became useless or abandoned by the military authorities. After his review of the facts the Commissioner says:

> "This seems to us to entitle his claim, or that of his heirs who shared with him the privations of a frontier life, to serious consideration, and believing that Hackley made entry in good faith and for the purpose of securing a home under the provisions of the acts of 1813 and 1826, then in force, we consider his claim superior, in the absence of an adverse claim, to the claims made after the abandonment of the fort in 1883."

At page 34 the Commissioner further finds that:

> "Hackley's settlement antedates all other claims, antedates the selection of a site for the cantonment; antedates the reservation. He appears, in fact, to be the first white man who ever lived on this land. He unquestionably is fully protected by the act of 1826, that of 1858, and that of July 5, 1884. He meets the requirements of the first proviso of the second section of the latter act."

At page 35 the Commissioner says:

> "I have, therefore, rejected all the claims to this tract, and to each legal subdivision thereof, with the exception of that of the heirs of Hackley, who will, if this decision become final, be allowed to make entry under section 2269, Revised Statutes, U. S."

In the opinion of Secretary Noble, Exhibit H, at page 42, the Secretary says:

> "The local officers first considered the claim of the heirs of said Hackley, and found that said R. J. Hackley entered upon the land claimed by his heirs, included in said reservation, in 1824, under the provisions of the act of Congress

approved February 5, 1813, and April 22, 1826; that said Hackley never relinquished his claim to said land; that Hackley made entry in good faith, and for the purpose of securing a home, under said acts of 1813 and 1826."

And, page 45, the Secretary further states with reference to the Hackley claim:

> "The facts relative to his settlement do not appear to be disputed. He went upon the said land in 1823 and 1824, prior to the selection thereof for a military site by Colonel Brooke, and was removed therefrom by the military forces in possession of the reservation in March, 1824; that in 1835 he filed in the local office at St. Augustine, Florida, proof in support of his claim; and afterwards, on November 21, 1843, he filed in the Newnansville Land Office, same State, a notice that he claimed 'right of pre-emption to the tract of land known as Cantonment Brooke, Bay of Tampa, under the pre-emption act approved May 22, 1826'; that in 1845 said Hackley died in Tallahassee, in said State, where he continued to reside after being removed from said land. On October 14, 1887, the administrator of the estate of said Hackley applied to purchase said lands, which application was rejected because the land applied for was embraced in said reservation. Upon a subsequent hearing the local officers found that Hackley had a prior claim, and you awarded all the land in said reservation to his heirs."

The Secretary then proceeds to consider the propositions of law involved in the discussion of Hackley's rights, and decided adversely to the Hackley claim upon conclusions of law.

In the opinion of Secretary Smith, rendered July 24, 1894, as Exhibit J, p. 58, the Secretary says:

> "It appears that R. J. Hackley entered upon the land claimed by his heirs, included in said reservation, in 1824, and the said Hackley never relinquished his claim to said land; and that he made settlement in good faith, so far as the record discloses, for the purpose of securing a home."

The Secretary then proceeds to consider the Hackley claim purely upon questions of law, and upon conclusions of law decided adversely to said claim.

It will thus be seen that nowhere in the opinions rendered by the different officers of the Interior Department does it appear

that the Secretary of the Interior found, as a matter of fact, that Hackley or his heirs had not complied with the provisions of the statute; but that, to the contrary, they have in each case adopted the finding of the Register and Receiver, to the effect that Hackley did perform all the acts necessary to a compliance with those statutes, and decided upon propositions of law that the legal representatives of said Hackley were not entitled to said land.

All of the statements above set forth in the bill and exhibits are admitted by the demurrers, and the demurrants are not permitted to set up a statement of fact adverse to the facts so alleged.

This specification is, therefore, bad as a "speaking demurrer."

Nor can either of the specifications of demurrer now under consideration be sustained on its merits.

The law is settled beyond controversy by a long line of decisions that the courts have jurisdiction to review the decisions of the officers of the Land Department on questions of law.

Cunningham v. *Ashley,* 14 How., 377 (14–162).
Barnard v. *Ashley,* 18 How., 43 (15–285).
Garland v. *Wynn,* 20 How., 6 (15–801).
Lindsey v. *Hawes,* 2 Black, 554 (17–266).
Johnson v. *Towsley,* 13 Wall., 72 (20–485).
Lee v. *Johnson,* 116 U. S., 48.
Quincey v. *Conlan,* 104 U. S., 420.
Rietor v. *Gibson,* 111 U. S., 276.
Sparks v. *Pierce,* 115 U. S., 408.
Johnson v. *Dillon,* 34 Fla., 130.

In *Johnson* v. *Towsley,* 13 Wall., 72, which is a leading case upon this point, and cited in all subsequent decisions where the question has arisen, the decision of the court is stated in the syllabus as follows:

> "Courts of equity have the power to inquire into and correct mistakes, injustice and wrong in judicial and executive action, when it invades private rights.
>
> "When officers of the Land Office decide controverted questions of fact, in the absence of fraud, imposition or mistake, their decisions on those questions are final, except as they may be reversed on appeal in that department.
>
> "But when they, by misconstruction of the law, take from

a party that to which he has acquired a legal right, the courts have power to give relief.

"This court will refuse to interfere by mandamus or injunction with officers having charge of settling public lands in the discharge of their duties, so long as the title remains in the United States and the matter is rightfully before those officers for decision.

"But after the title has passed from the government, and the question becomes one of private right, courts may inquire whether the party holding that title should hold absolutely as his own, or as trustee for another."

These principles, which have been affirmed time and again by the Supreme Court, are not controverted by any of the authorities cited by counsel for the demurrants, but are supported by them. We have already quoted at length from *Lee* v. *Johnson*. In *Quinby* v. *Conlan*, 104 U. S., 420, the court held:

"The courts cannot exercise any direct appellate jurisdiction over the rulings of officers of the Land Department, nor can they reverse or correct them in a collateral proceeding between private parties.

"It is only when those officers have clearly misconstrued the law and denied to parties their rights, or where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can interfere and refuse to give effect to their action."

It is respectfully submitted, therefore, that the questions raised in the case at bar are purely questions of law, and the demurrers on this ground are not well founded.

III. Objection that the Bills are Vague, Insufficient and Indefinite.

This objection is found in the separate demurrer of S. Y. Finley, section 2, pp. 83, 84, as follows:

"Because said bill of complaint, and amendment thereto, are vague, insufficient and indefinite, and do not state facts sufficient to authorize a court of equity to take jurisdiction in said cause, and to grant the relief prayed for against the defendants or any other relief."

This ground, which appears to be a *pro forma* objection, is general, and does not specify in what particular the bill is vague, insufficient or indefinite. We respectfully submit that the bill and exhibits set up clearly, specifically and at length all the facts upon which complainants base their right to an equitable interest in the land in controversy. This is all they are required to do. Anything further would be bad pleading.

Shipman's Eq. Pl., 323, *seq.*
Story's Eq. Pl., secs. 252 and 253.
St. Louis v. *Knapp Co.*, 104 U. S., 658.

It is difficult to conceive how bills could be more definite and certain without entering into that detail of statement which would cause prolixity and confusion, which should always be avoided by the pleader in equity.

IV. The Objection that There is no Allegation of Such Facts as Establish Fraud or Collusion Between the Defendants.

This objection is found as section 3 of the separate demurrer of S. Y. Finley, page 84, as follows:

> "Because said bill does not show any fraud, or knowledge of fraud, mistake or illegality on the part of the defendant or his grantors, as against said complainants, or any facts constituting a fraudulent collusion to injure the complainants."

In reply to this objection, it is only necessary to remark that the complainants do not base their right to the relief prayed for upon the ground that there has been fraud. This feature of the case has been hereinbefore more particularly discussed in distinguishing between cases based upon errors of law, as in the case at bar, and those based upon fraud.

The charge of collusion is made in connection with the conveyance to the defendant, Finley, whom the bill alleges was counsel for the patentee before the Interior Department, and specific allegation is made that the conveyances through which he claims were without real, legal or valuable consideration. (R., pp. 15 to 20.) Admitting this statement to be true, the charge of col-

lusion is proper, and the sole purpose of this charge and of these allegations in the bill is to show that the parties holding under conveyances made by the patentees took the property without real or valuable consideration, and with full knowledge of the rights of the complainants, and, therefore, a court of equity would be justified in declaring them to be trustees for the legal title which is vested in them, and requiring a conveyance of that title to the complainants, should the court be of opinion that the patents should have been issued to the complainants instead of to the patentee.

It is respectfully submitted, therefore, that there being no charge of fraud in the bill, the complainants are not required to allege facts which constitute fraud, and that the facts set out with respect to these conveyances, and admitted to be true by demurrer, are sufficient to support the charge of collusion as made by the bill only in connection with the conveyances, and not in connection with the original patent.

V. The Objection that the Defendants are Bona Fide Purchasers for Value, Without Notice.

This objection is expressed in sections 10 and 11 of the joint and separate demurrers of the defendants other than Finley, page 81, as follows:

> "*Sec.* 10. The Honorable Secretary of the Interior of the United States having decided on March 8, 1898, as shown by Exhibit K to complainant's bill, that all of the defendants except Lizzie W. Carew, the sole heir-at-law of the original patentee, were innocent *bona fide* purchasers, as shown by the evidence before the Interior Department, and such fact became finally adjudicated, and cannot now be reviewed by the courts, and the bill in this cause as to all the defendants, except Lizzie W. Carew, should be dismissed.
>
> "*Sec.* 11. It appearing from the allegations in complainants' bill that patent issued on the 30th of January, 1896, and that the titles to all the defendants who purchased from Lizzie W. Carew were predicated upon said patent, such purchasers are *bona fide* and lawful in the absence of fraud, and complainants' bill should be dismissed as to all of the grantees of Lizzie W. Carew."

In the separate demurrer of S. Y. Finley to the same bill, section 6, this objection is made in practically the same language as in section 10, quoted above (page —).

These specifications are bad in that they constitute "speaking demurrers."

Shipman's Eq. Pl., p. 373.
Stewartson v. *Masterson*, 131 U. S., 151.

The demurrants in these specifications have attempted to set up the fact that the Interior Department found in the evidence before it that the parties here made defendants were *bona fide* purchasers for value. It is submitted that there is nothing in the bill itself, or in the exhibits thereto, to support this contention. The only statement in any exhibit filed with the bill which refers to this subject at all is found on page 74, opinion of the Secretary, on the Bilbie petition, in which, after stating that it appears from affidavits and exhibits in the department, that nearly all the land patented has been sold and conveyed, the Secretary says:

> "The presumption is that such parties are innocent purchasers for value, and without notice of any defect in the title of the patentees, on account of fraud or other infirmity."

This holding could not bind the complainants, as they were not parties to this proceeding, besides which no specific mention is made of the defendants other than Mrs. Carew, nor is it stated who were the innocent purchasers. The question was not before the Secretary for decision, *nor within his jurisdiction.*

Admitting, however, this presumption, where nothing to the contrary appears, yet in the cases under consideration the presumption is overcome by the express allegations of the bill, which allegations are admitted on demurrer. In the bill the complainants have alleged specifically the conveyances to the various defendants other than defendant Carew, and set out the consideration upon which those conveyances were made, which in every case was merely nominal, ranging from one to ten dollars.

The complainants have further alleged, after making these specific allegations, that the conveyances were without real, legal or valuable consideration, and that the parties, both grantors and

grantees, had full knowledge of the rights of the complainants in said land. Here we have positive allegations of want of sufficient consideration to support the conveyances of large tracts of valuable land, followed by other positive allegations that the conveyances were without real, legal or valuable consideration, and that the grantees thereunder took with full notice of the rights of the complainants; which allegations negative in positive terms and overcome any presumption, if any exists, that the defendants are *bona fide* purchasers for value without notice. It is respectfully submitted, therefore, that not only is this demurrer open to the fatal objection that it is a "speaking demurrer," but it cannot be maintained in the face of the positive allegations of the bill.

VI. Objection that the Complainants are Precluded from Relief by Reason of Laches.

This objection is stated in the 4th specification of the demurrer of S. Y. Finley, page 84, as follows:

> "Because said bill shows such laches as to preclude a court of equity from granting the relief prayed, or any relief against this defendant."

It is well settled by the authorities that there is no general rule to guide the courts in deciding what does or does not constitute laches; that the question is one to be determined by the court in the exercise of its sound discretion, and in the exercise of this discretion the court must consider all the facts and circumstances of the particular case. Thus in the case of *Brown* v. *County of Buena Vista*, 95 U. S., 157, 160, the Supreme Court says:

> "But a court of equity applies the rule of laches according to its own ideas of right and justice. Every case is governed chiefly by its own circumstances. Whether the time the negligence has subsisted is sufficient to make it effectual is a question to be resolved by the sound discretion of the court."

So in the case of *Twin Lick Oil Co.* v. *Marbury*, 91 U. S., 587, 591, the same court says, in speaking of what is a reasonable time in which to bring a suit:

> "This has never been held to be any determined number of days or years as applied to every case, like the statute of limitations, but must be decided in each case upon all the elements of it which affect that question."

See, in this connection, the case of *Amos* v. *Campbell,* 9 Fla., 187, where the Supreme Court of this State held that "there is no rule defining what *lapse of time* will bar a purely equitable demand. Each case depends upon its own circumstances." And refused to apply the doctrine of laches where a complainant had slept on his rights for a period of fifteen years.

In the leading case of *Sterndale* v. *Hankinson,* 2 Simons, 398, the vice-chancellor, after laying down the principle that as a general rule a court of equity, while not bound by the statute of limitations, will apply the period fixed in such statute, says:

> "Where the circumstances of the case are such as to make it against conscience to apply the rule founded upon this analogy, the court will not enforce it."

While, as shown by the above authorities, the question of the application of the purely equitable principle of laches to bar a plaintiff's right is entirely within the discretion of the court, yet it is the general rule with courts of equity to adopt the analogy of the statute of limitations as a limitation upon suits of equity of a similar character, though if the application of this limitation be inequitable the courts will not apply it.

The leading case upon the subject is that of *Elmendorf* v. *Taylor,* 10 Wheat., 152, which was a suit identical in character with those now under consideration, being a bill in equity to declare a trust and require the conveyance of real property. In the opinion by Chief Justice Marshall, pp. 168 to 177, the principle of the limitation to suits in equity is discussed at length. In that case no question was raised as to the application of a shorter period of limitation than that provided by statute for an action of ejectment; but the court considered whether or not it would apply the period fixed for an action at law to recover real property to a suit of the character under consideration. The court, after a complete review of the authorities, reaches the conclusion expressed in its decree, as follows:

"And this court is further of the opinion that in cases of adversary title, such an adversary possession as would bar an ejectment, did the plaintiff possess the legal title, constitutes also a bar to a bill in equity."

In the case of *Baker* v. *Whiting*, 3 Sumner, 45 (2 Fed. Cas., 495), Mr. Justice Storey, in delivering the opinion of the court, says:

"But, what is more particularly applicable to the present case, twenty years had not elapsed before the filing of the bill, and I apprehend that in case of a trust of lands *nothing short of a statute period which would bar a legal estate or right of entry would be permitted to operate in equity as a bar to an equitable estate.* This doctrine seems to be admitted by the authorities ever since the great case of *Cholmondeley* v. *Clinton*, and it has been repeatedly acted upon in the Supreme Court of the United States." (Italics ours.)

In *Dugan* v. *Gittings*, 3 Gall, 138; 43 Am. Dec., 306, the court holds:

"A court of equity, in applying the statute of limitation analogically, would not permit the claim of a party to real property to be affected by any devolution of time *short of that which would have barred him at law in an action of ejectment.*" (Italics ours.)

See, to the same effect:

Hall v. *Russell*, 3 Sawyer, 506.
Manning v. *Hayden*, 5 Sawyer, 360.
Taylor v. *Holmes*, 14 Fed. Rep., 498.
Oakland v. *Carpenter*, 13 Cal., 540.
Love v. *Watkins*, 40 Cal., 547, 570.
Note 12 Am. Dec., 371, where the cases are collated and reviewed.

It is submitted that the authorities above cited (and numerous others might be produced to the same effect) establish the propositions that the application of the principle of laches to suits of equity is within the discretion of the court, and it is only applied in cases where justice and good conscience demand that it should

be done; that where the principle is applied at all, the analogy of the statute of limitations is adopted; that in suits in equity to declare the legal title to land to be held in trust and require a conveyance, the courts in applying the principle of laches, if it is applied at all, adopt the period of limitation fixed by statute upon actions of ejectment, and that no shorter period is applied.

The statutory period of limitations upon actions for the recovery of real property in Florida is seven years (Rev. Stats. of Fla., Sec. 1287–1288). The patents in the cases under consideration were issued to the defendants in 1896. These suits were brought in 1900, only four years after the right of action accrued, and three years within the statutory period of limitation. These facts, in the light of the authorities cited, constitute a complete answer to the contention that the doctrine of laches is applicable to this case. This position, however, is even stronger when the facts and circumstances of the cases at bar are considered.

It appears from the allegations of the bill that from early in the year 1835, as soon as the land office was opened in Eastern Florida, and communication with the same could be had, down to 1845, the date of his death, Robert J. Hackley continually and persistently asserted his right to the land in controversy; that subsequent to that date his legal representatives attempted to have their rights perfected in Congress and before the Interior Department, and were active and diligent in the prosecution of those rights before that department from the time the matter was referred to the Register and Receiver for a hearing until the patents were issued in 1896.

The bill also shows that the complainants are scattered from California to New York, and many are residents of Virginia. As a result, it necessarily required time and correspondence for the parties to decide what action they would take upon the adverse decision of the Interior Department, and to make their arrangements to enter upon expensive litigation.

It further appears from the allegations of the bill that almost immediately after the decision of the Secretary of the Interior awarding the lands to the present patentees, and the issuance of the patents thereon, James W. Bilby and other persons residing on this land filed a petition before the Interior Department alleg-

ing that the issuance of the patents had been secured by fraudulent means, and praying that the United States would institute suits to have the same cancelled and set aside. This petition was pending until 1898, when the decision was rendered declining to request the Attorney-General to institute such proceedings. So long as this petition was pending before the department, the question as to the legal title to this property was unsettled, and it would have been unwise on the part of the complainants to have instituted suits in court to require the patentees to convey the legal title to them until the question as to the validity of the patents under which the defendants held legal title had been finally settled by the Interior Department. If the decision of the Interior Department had been in favor of Bilby and his co-petitioners, proceedings would doubtless have been instituted by the United States Government to annul and set aside these patents, and if the complainants had immediately upon the issuance of the patents, while this Bilby petition was still pending, instituted their proceedings in this court to have the trust declared and the legal title to the property conveyed to them by the patentees, they might at the end of their litigation, if successful, have been met with the fact that by proceedings on the part of the government the patent had been cancelled and legal title revested in the government, and have found that all their litigation, expense and trouble had been for nothing.

But little over two years—1898 to 1900—elapsed from the decision in the Bilby case to the commencement of these proceedings, surely not sufficient time to constitute laches.

It may be observed, however, that a complete answer to this ground of demurrer is found in the fact, as set out in the bill, that many of the complainants are infants. The doctrine of laches cannot be applied by a court of equity so as to defeat the rights of infants, and the demurrer in this case being to the whole bill, upon this ground alone it is bad.

Whether tested by analogy of the statute of limitations in bar of actions for the recovery of real property, or the peculiar facts of this case set up in the bill, the objection of laches is not well taken.

VII. Objection that the Suits are Barred by the Statute of Limitations of the State of Florida, Paragraph 4, Section 1294, Revised Statutes of that State.

This objection appears in the thirteenth specification of the demurrer of Lizzie W. Carew and others, p. 81, as follows:

> "It appears from the allegations of complainants' bill that patent issued for the lands involved in this suit to Edmund S. Carew, on the 30th of July, 1896, more than four years before the filing of complainants' original bill, and this suit is barred by the statute of limitations of the State of Florida." (Par. 4, Sec. 1294, of the Rev. Stats. of the State of Florida.)

Substantially the same objection appears in the fifth specification of demurrer of S. V. Finley, p. 84.

Before entering into a detailed discussion of the statute, it may be well to call attention to the well-established principle that in purely equitable suits, such as those now before this court, a court of equity will, or will not, apply the statutory period of limitation as the demands of justice may require. This is particularly true as to the courts of equity of the United States as distinguished from the State courts.

The general doctrine is well stated in the leading case of *Sterndale* v. *Hankinson*, 2 Simons, 398, in which the Vice-Chancellor said:

> "The other fallacy is that the statute bars a suit in equity, which it does not, but as courts of equity will not entertain stale demands, they have thought proper to adopt the limit of six years in analogy to the statute, and pleas of the statute are admitted in these courts by analogy only. *Where the circumstances of the case are such as to make it against conscience to apply the rule founded upon this analogy, the court will not enforce it.*" (Italics ours.)

In *Buckingham* v. *Ludlum*, 37 N. J., Eq., 137, 146, the Supreme Court of New Jersey, in discussing this question of the application of the statute of limitations to purely equitable suits, said:

> "It may safely be said, then, that after the partnership assets were in court the remedy of the creditors of the firm

> against them was exclusively equitable. To such remedies the statute of limitations does not apply. Courts of equity are not within the terms of the statute, and while they follow it by analogy, and have adopted as a rule the limit of six years in analogy to the statute, as the time within which a suitor in certain cases must bring his action, yet they do not adhere to it so inflexibly as to feel obliged to deny relief to every suitor who asks their aid after the expiration of the limited time."

Quoting with approval the case of *Sterndale* v. *Hankinson, supra.*

In the case of *Sullivan* v. *Portland, etc., Ry. Co.*, 94 U. S., 807, 811, the Supreme Court of the United States says:

> "Every case is governed chiefly by its own circumstances. Sometimes the analogy of the statute of limitations is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient, and sometimes the rule is applied where there is no statutable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence, and to decide accordingly."

But even if this statute were applicable to a purely equitable suit in one of the State courts of Florida, it is submitted that it would not be binding in the equity courts of the United States. The courts of the United States are not bound by statutes of this character, but administer equity jurisdiction in accordance with the rules and principles which formerly governed the High Court of Chancery of Great Britain, a jurisdiction which is entirely separate and distinct from the States in which such courts may sit.

In *Kirby* v. *Lake Shore, etc., R. R.*, 120 U. S., 130, 137, Mr. Justice Harlan, in discussing statutes of this character, after laying down the general rules as to the independence of the equity jurisdiction of the courts, says:

> "They are peculiarly applicable to a local statute which if followed would impair the power of the United States to enforce the settled principles of equity in suits of which they have, by the constitution and laws of the United States, full jurisdiction. While the courts of the Union are required by the statutes creating them to accept as rules of decision in

trials at common law the laws of the several States, except where the constitution, laws, treaties and statutes of the United States otherwise provide, their jurisdiction and equity cannot be impaired by the local statutes of the different States in which they sit.

"In the *United States* v. *Howland*, 4 Wheat. 108, 115, Chief Justice Marshall, speaking for the court, said that as the courts of the Union have a chancery jurisdiction in every State, and the Judiciary Act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction must be the same in all the States. The same view was expressed by Mr. Justice Curtis in his work on the jurisdiction of the courts of the United States, when he observed that the equity practice of the courts of the United States is the same everywhere in the United States, and they administer the same system of equity rules and equity jurisprudence throughout the whole of the United States without regard to State laws. On page 138 the learned judge further says, If the legal remedies are sometimes modified to suit the changes in the laws of the State, and the practice of their courts, it is not so with the equitable. The equity jurisdiction of the courts of the United States is the same that the High Court of England possesses; it is subject to neither limitation nor restraint by State legislation, and is uniform throughout the different States of the Union."

In the case of *Tice* v. *School District*, 17 Fed. Rep., 283, a suit was brought in the United States Court to set aside a judgment at law, and for a new trial, on the ground of surprise at the trial and newly discovered evidence. The statute of limitations in that State (Nebraska) provided that where the grounds for new trial could not with reasonable diligence have been discovered before, but are discovered after the term at which the verdict, report of receiver, or decision was made, the application may be made by petition filed as in other cases, etc., but "no such petition shall be filed more than one year after the final judgment was rendered." The district judge denied the petition on the ground that this statute was applicable. The Circuit Court set aside the order dismissing the bill, and, in discussing this question, said:

"Our jurisdiction in chancery is not derived from or limited by State laws. The rules governing its exercise are the same in all the States, and are according to the practice

> of courts of equity in the parent country, as distinguished from courts of law. It is a jurisdiction conferred by the Constitution of the United States and the acts of Congress, and if it could be controlled or varied by State legislation it could be extinguished by the same authority. This proposition was strongly stated by the Supreme Court of the United States in the early case of *Robinson* v. *Campbell,* 3 Wheat., 218, and has since been repeatedly recognized by that court. It is true that the Federal courts of equity usually follow by analogy State statutes of limitation, but they will not do so if the effect of such statute in any case is to limit their general chancery jurisdiction."

In *Bisbee* v. *Evans,* 17 Fed. Rep., 474, the Circuit Court for the District of Kentucky, in discussing the statute of limitations of that State, said:

> "This, however, does not control this court. Courts of equity in the State allow the bar of the statute of limitations in obedience to the statute, but United States equity courts apply the statute by analogy, and not in obedience to it."

The court in that case overruled a demurrer based upon the contention that the right was barred by the statute.

But even where the courts of equity of the United States do by analogy apply the statutory period of limitation to purely equitable suits, they adopt the period fixed by statute for actions most nearly analogous to the case which may be under consideration; *i. e.*, in a suit to have the title to real property declared to be held in trust, and to require a conveyance, the period of limitation fixed for actions for the recovery of real property is applied, as being most nearly analogous in nature and purpose to the class of suits referred to.

The authorities upon this proposition have been noticed in discussing the question of laches, but may be again briefly referred to. As we have seen, the case of *Elmendorf* v. *Taylor,* 10 Wheat., 152, is a leading case in point, and there Chief Justice Marshall, after an elaborate review of all the authorities, held that a court of equity in a suit to declare a trust and require a conveyance of real property, would apply the period of limitation of twenty years fixed by the statute for actions of ejectment at law. This case and the doctrine there laid down has been followed by the

United States courts from that day to this, and has been reiterated time and again in the different State courts of the Union.

Lewis v. *Marshall,* 5 Pet., 470.
Peyton v. *Stith,* 5 Pet., 485.
Miller v. *McIntyre,* 6 Pet., 61.
Coulson v. *Walton,* 9 Pet., 62.
Boone v. *Child,* 10 Pet., 177.
Beaubien v. *Beaubien,* 23 How., 190.
Hall v. *Russell,* 3 Sawyer, 506.
Fussell v. *Hughes,* 8 Fed. Rep., 384.
Taylor v. *Holmes,* 14 Fed. Rep., 498.
Dugan v. *Gittings,* 3 Gill, 138.
Ward v. *Van Bokkelen,* 1 Paige, 100.
Paschall v. *Hinderer,* 28 Ohio, 568.

The cases cited above are mostly suits to declare a trust and require a conveyance of the legal title to real estate, as in the cases at bar, and they establish beyond controversy that in suits of this character if a court of equity in its discretion applies a period of limitation, it will adopt, by analogy, the statutory period fixed for actions of ejectment, or similar actions for the recovery of real property.

It is submitted, therefore, that the authorities cited establish three propositions:

(1) That the statute of limitations has no application to courts of equity, and that the courts will not apply the statutory period of limitation where it is contrary to equity and good conscience to do so.

(2) That this is peculiarly true of the equity courts of the United States, and that they will not apply the period fixed in the State statutes of limitation, where it would limit their general equitable jurisdiction, or their power to administer justice in accordance with equity and good conscience.

(3) That in suits to declare a trust and require conveyance of a title to real property, if courts of equity follow the analogy of the statute of limitations for the State in which the property is located, they always apply to such suits the period of limitation fixed by the State statutes upon actions of ejectment, and similar

actions for the recovery of real property at law, and that no shorter period will bar a suit in equity.

In the light of these established principles let us examine the contention made by the demurrer with reference to the statute of limitations of Florida.

The Statute of Limitations of Florida.

Chapter 26, of Title 1, Part 2, of the Revised Statutes of Florida (1892) is divided into three articles: The first deals with provisions of the statute of limitations applicable to all classes of actions, the second with limitations applicable to actions for the recovery of real property, and the third provides the limitations upon personal actions and actions other than real. The sections of article 2, limiting actions for the recovery of real property are as follows:

> "1287. Actions for the Recovery of Real Property.—No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained unless it appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within seven years before the commencement of such action."
>
> "1288. Actions Founded on Title to Real Property.—No cause of action or defence to an action founded upon the title to real property or to rents, or to service out of the same, shall be effectual unless it appear that the person prosecuting the action or making the defence, or under whose title the action is prosecuted or the defence made, or the ancestor, predecessor or grantor of such person was seized or possessed of the premises in question within seven years before the accruing of the right of action or defence in respect to which such action is prosecuted or defence made, or unless it appear that the title to such premises was derived from the United States, or the State of Florida, within seven years before the commencement of such action; and the period of limitation shall not begin to run until the passage of the title from the State or the United States."
>
> "1292. Actions of Persons under Disability.—If a person entitled to commence any action for the recovery of real property, or to make an entry, or defence founded on the title to real property or to rents or services out of the same, be at the time such title shall descend or accrue either

(1) within the age of twenty-one years, (2) insane, (3) imprisoned, the time during which said disabilty shall continue shall not be deemed any portion of the time in this chapter limited for the commencement of such action, or the making such entry or defence, but such action may be commenced, or entry or defence made, within the period of seven years after such disability shall cease, or after the death of the person entitled who shall die under such disability; but such action shall not be commenced or entry or defence made after that period."

Article 3, dealing with personal actions, contains numerous provisions embraced in section 1294, fixing the limitations upon certain classes of actions upon contracts, &c. Paragraph 4 of said section is as follows:

"4. WITHIN FOUR YEARS.—An action for any article charged in a store account, and any action for relief not specifically provided for in this chapter."

As will be seen by reference to the demurrers, it is contended that the language of the above paragraph covers the suit at bar. In support of their contention the demurrants rely upon the case of *Branch* v. *Cole*, 18 Fla., 368, which was decided in 1881–'82, ten years before the adoption of the Revised Statutes.

In 1872 the Legislature of Florida enacted a statute of limitation, of which the first nine sections dealt with actions for the recovery of real property; sections 10 and 11 restricted the time within which various actions for the recovery of personal property might be instituted. Section 12 provided: "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action has accrued." It was under this statute that the case of *Branch* v. *Cole* was decided. That case held that a suit in equity claiming dower and mesne profits, was not an action for the recovery of real property, based upon seizin or possession of the plaintiff, her ancestor, predecessor or grantor, but that such a suit was "an action for relief not hereinbefore provided for" within the meaning of the twelfth section of the act of limitations of Florida, then in force. Mr. Justice Westcott, delivering the opinion of the court, page 378, expressly bases the decision upon the fact that the said Act of limitations was passed

when the Code of Procedure was in force, which abolished all distinction between actions at law and suits in equity, "by which the legislative intent and the scope and effect of this section must be controlled." He also calls attention to the fact that "under the Code the appropriate method to assert such right" (being that under consideration) "was a civil action by complaint." The right sought to be enforced was a *statutory,* not an equitable right.

The fact of the Code of Procedure being in force at the time of the passage of the Act of limitations of 1872, as governing the interpretation of that act is also made to appear in *Browne* v. *Browne,* 17 Fla., 619.

The Revised Statutes of Florida, above referred to, which contain the statute of limitations now in force, was a revision of the laws of a general nature. It was enacted by the Legislature of 1891, and was published and went into effect in 1892. This revision made many changes in the statute of limitations as it had existed by the act of 1872. Among others, the language of section 12 of the act of 1872 was changed. And instead of this section applying to limitations generally, as by the act of 1872, it was not embraced in Article I. of the chapter of the Revised Statutes, applying to all classes of actions, nor in Article II., applying to real property, but was made a part of Article III., which deals exclusively with personal actions.

The act adopting the Revised Statutes repealed every statute of a general nature enacted by the State or Territory of Florida not included in the Revised Statutes. The chapter on limitations of actions differs in many particulars from the act of 1872—the language of section 4, under consideration, varying from that of section 12, of the act of 1872—thus such section and act stood repealed and superseded by the adoption of the revision. As before stated, the *Code* had long since been repealed, and the reasons given for the decision in *Branch* v. *Cole* could not apply to the suit brought after the enactment of the present statute of limitation. That case construed a different statute under different conditions, and was decided upon its peculiar facts. It certainly can have but little if any weight in the face of the unbroken line of authorities to the effect that a court of equity, if it adopts the analogy of the statute of limitations in suits to declare

a trust and require the conveyance of real property, will adopt the period fixed for *actions of ejectment* to recover real estate at law.

Notwithstanding *Branch* v. *Cole,* we are satisfied that the Supreme Court of Florida, even under the act of 1872, would not have applied the limitation of four years to an action of the nature of the case at bar. This is manifest in *Sloan* v. *Sloan,* 25 Fla., 521, which was a bill in equity to remove cloud from title to realty, while not a direct decision, it is evident that the court considered the seven years' limitation as to realty as applying to that suit.

Henderson v. *Chairs,* 35 Fla., 432 was relied on by the appellees, in the court below, as affirming *Branch* v. *Cole.* The former case was a bill to compel the executors of an estate to pay money to the complainant as her dower interest in the estate, and did not involve a suit for realty. The suit was brought prior to the enactment of the Revised Statutes. *Branch* v. *Cole* is not in terms affirmed, but merely referred to as a decision on the statute of limitations applicable to actions for dower.

Section 1288 of the Revised Statutes, above quoted, provides that where title to land is derived from the United States the period of the statute of limitations shall not begin to run until the passage of the title from the United States.

Under the provisions of this statute, if the complainants could have brought an action at law founded upon the title to real property, the title having been derived from the United States, the period of limitation against them would have begun to run with the issuance of the patent, and the action would have been barred seven years from that date. In the case at bar the complainants, not having any legal title, cannot bring an action at law, but in suits founded upon their equitable title to real property, are contesting the title derived from the United States. It would seem, therefore, in the light of the authorities cited, to be too clear for extended argument that a court of equity, if it adopts the analogy of the statute, will adopt the period fixed by said section 1288.

But it is submitted that even if the statute of limitations were applicable to these suits, the demurrers would have to be overruled, because the bills show upon their faces that many of the

complainants are under the disability of infancy. By section 1292 of the Revised Statutes of Florida, quoted above, it is expressly provided that the statute of limitations does not run against persons under the disability of infancy.

It is well settled that where the statute of limitations is pleaded by demurrer to the whole bill, and the bill shows that any one or more of the complainants are under such disability that they are not affected by the statute, then the demurrer must be overruled. Thus in *Keowne* v. *Love,* 65 Texas, 152, 156, the Supreme Court of Texas says, in speaking of the defence of the statute of limitations in that case:

> "It appears, however, that they set up the same defence by demurrer, and that this was overruled. . . . The overruling of the demurrer was necessarily correct, for the demurrer went to the entire cause of action asserted by each and every one of the complainants, while many of them were shown by the pleadings to have been under such disabilities as would prevent the running of the statute as to them prior to the institution of this suit, even if, as against persons not under disability, the statute as to any part of the cause of action would have run from the time of the death of the administrator of Pope."

See also *Coney* v. *Horne,* 93 Ga., 723.

We will now briefly review the principal authorities cited by appellees, in the court below, on this subject.

Norris v. *Haggin,* 136 U. S., 386 (34–424), is a case appealed from California, which in no wise militates against our contentions, but on the contrary sustains them. In this case a bill was filed alleging that defendants, who were the agents and attorneys of complainant, procured from him by fraud, when he was not in his right mind, deeds, mortgages, and other instruments in writing, whereby they secured title to a large quantity of land, and praying for restoration of the property, etc. The court found that fifteen years had elapsed after the time that complainant's mind became restored before suit was instituted, that the statute of limitations for the recovery of real property in California was five years, and held that "a court of equity is governed by the analogies of the statute of limitations" and that "where the object of a

suit is to do what could be done at law, namely, recover possession of real estate, and the plaintiff is guilty of the laches which a court of equity regards equivalent to a statute of limitations, such unexplained delay is a bar to the suit."

Teall v. *Schroder,* 158 U. S., 172 (39–938), also a case from California, was a suit in equity against Schroder and three hundred and thirty-four other defendants, to enforce the transfer by them to complainants of certain lands, charging that defendants came into possession of them by fraud. Thirty-two years elapsed after the alleged fraudulent acts before suit was brought, during which time the property was conveyed to numerous persons, the defendants, or those under whom they claimed. Justice Field in his opinion says: "Section 19 of the Act of April 22, 1850, reads as follows: 'An action for relief not hereinbefore provided must be commenced within five years after the cause for action occurred.' This section applies specifically to actions for equitable relief. Other sections of the act provide for the limitations of actions at law."

He also quotes the provision of the Code of Procedure that a cause of action on the ground of fraud must be brought within four years after the action occurs. He holds that the suit must be dismissed under the statute of limitations of California whether in court of law or equity, and also from other facts which show that complainants were barred from all relief when the suit was brought. It is to be noted that California is a Code State having but one form of civil action.

Baker v. *Cummings,* 169 U. S. (42–711), has no application to the case at bar, it is a suit in equity to procure cancellation of sale of interest in certain fees of complaint to his former partner on the ground of fraud, and for an accounting: The court held that case was within bar of the statute of limitations of Maryland of three years from the discovery of the fraud.

Cleveland Insurance Co. v. *Reed,* 24 How., 284 (16–686), bill to enforce mortgage lien. Held to be barred by the Wisconsin statute of limitations, which provides that "bills for relief in cases of the existence of a trust not cognizable by the court of common law, and in all other cases not hereinbefore provided for shall be filed within ten years after the cause thereof shall accrue, and

not after that time." This provision specifically and exclusively applies to bills in equity.

St. Paul, &c., R. Co. v. *Sage*, 49 F. R., 315. Circuit Court of Appeals, 8th Circuit, Minnesota. Bill to recover lands conveyed by State of Minnesota to St. Paul, Stillwater & Taylor's Falls R. R. Co., which, it was claimed, the Hastings & Dakota R. Co., original complainants, were entitled to have had conveyed to that company by the State. Minnesota statute provides six years limitations to an action for relief on ground of fraud. The judge delivering the opinion expressed the view that this act applied to an action based on legal fraud involved in the refusal of a person who has become invested with the legal title to lands to convey the same to the real owner, or to account to him for the proceeds thereof in case the lands have been sold, and that the above limitation applied. But admitted that there had been a contrary holding by the Supreme Court of Minnesota, in construing the same statute, in *Burke* v. *Association*, 40 Minn., 506; 42, N. W., 479. The court further held the suit barred by laches of fourteen years. It is to be noted that all distinctions between actions at law and suits in equity have been abolished in Minnesota, and there is but one form of action.

Street v. *Rigney*, 107, F. R., 545, Court of Appeals 8th Circuit, thoroughly sustains our contention, holding that the limitations of ten years, barring actions to recover lands, applies to all actions, whether legal or equitable, and is applicable to enforce trusts in real property and actions to set aside deeds in fraud of creditors.

Without burdening the court with an analysis of some other cases cited by counsel for appellees on this point in the lower court, we submit that an examination of them will show that they are not in conflict with the contention of counsel for appellants in this behalf.

In conclusion on this subject it is submitted in the light of the principles and authorities above discussed, that the statute of limitations of Florida has no application to purely equitable suits such as those under consideration, especially where those suits are in the equity courts of the United States; that if a statute of limitation is applicable at all, the court will apply that provision

of the statute covering actions at law most nearly analagous to the suits under consideration, to-wit: actions for the recovery of real property upon which the statutory limitation is seven years; that even if the statute upon which the demurrants rely were applicable in these cases, the demurrers would have to be overruled, because they are demurrers to the whole bill, and the bills show upon their face that many of the complainants are under the disability of infancy, and against these the statute could not run.

Conclusion.

In our argument, which has been extended much beyond the limits contemplated, we have attempted to analyze, and to meet fairly, every proposition advanced by counsel for the demurrants in opposition to the claims of the complainants. We submit that the authorities cited, when applied to the facts of this case, establish our position that Hackley and his legal representatives acquired, by virtue of the settlement in 1823–'24 and subsequent acts, a vested right of pre-emption in the purchase of, or an equitable interest in, the land in question, upon the passage of the act of April 22, 1826, which right or interest related back to the date of settlement; that the perfection of this right into a legal title had been delayed, and the enjoyment thereof suspended, by the occupation of the land by the government of the United States, until it was restored to the public domain in 1883; that said right or title has never been forfeited by failure to perform the conditions annexed to it, and that said conditions have been performed both by Hackley and his legal representatives, in letter and in spirit; that the Interior Department, therefore, erred in its construction of the law and in its failure to award the patents for this land to the legal representatives of Robert J. Hackley, the complainants herein.

In every case there are equitable considerations which make "the atmosphere of the case," and which should appeal to the "conscience of the chancellor," and influence to a greater or less degree his opinion upon the points involved.

Passing from an analysis of the various positions to a view of the case as a whole, the untenable and inequitable character of the position of the demurrants, and the strong position of the complainants becomes even more apparent.

An examination of the Record will show that the Register and Receiver, the Commissioner, and the Secretary of the Interior, in the first decision rejecting the claim of Mrs. Carew, based that rejection upon the ground that it was but a fraudulent effort to secure this land for speculative purposes—a ground which is fully sustained by the evidence cited in these opinions and made a part of the record.

It was only by eliminating much of the most important evidence that Secretary Smith was enabled to recognize and establish this claim, which the Record shows is based upon a settlement under an agreement originally made with Senator Call, for the purpose of securing this property for the city of Tampa, which arrangement Carew subsequently repudiated and claimed the property for himself.

On the other hand, Hackley originally made his settlement, as is admitted by all parties, for the purpose of securing a home, when the land in question was a part of the dense wilderness. He belonged to that class of settlers who, in the language of President Buchanan, are to be regarded as "public benefactors"—the pioneers in the advance of civilization, a class which has ever had the peculiar consideration of Congress, and has been the beneficiaries of numerous acts of a remedial character—a class whose rights have always been protected by both the executive and judicial departments of government, in recognition of their valuable services to the country in opening up waste lands to cultivation and to settlement.

While readily recognizing the right of the government to occupy this land for military purposes, Hackley never for one minute relinquished his right to the home which he had thus established when such occupation ended, but by numerous appeals during his life-time to the proper authorities, sought to perfect his right, which might be enjoyed when the occupation by the government had ceased. Since his death, in 1845, his legal representatives have continued in their effort to perfect their right to the tract of land in question. The equity of this claim brought from Hon. William Windom, of the Committee on Public Lands, of the Senate, the following report in 1876:

> "The claim of Mrs. Hackley seems to be a good one. The only doubt seems to be that the government might have erected costly buildings on the land, and it is hardly right, in his opinion, to give the land to the claimant. He proposed to refer her petition to the War Department for action on this particular, namely, the value of the buildings put upon the land by the government during its occupancy as a military post."

In 1878, Hon. A. H. Garland, member of the Committee on Public Lands, of the Senate, made the following statement:

> "The department insists that the government needs the land for a reservation. The committee are of the opinion that Mrs. Hackley has a good equity, and should be paid something, but that she could not *yet* get this land."

The difficulties suggested in the Senate have since been removed by the restoration of the whole reservation to the public domain, and the removal of the buildings. The government is no longer interested, and the contest is between the legal representatives of Hackley, with all the equities in their favor, and the defendants, whose claims are based upon settlement made after 1883—a settlement which various officers of the government, whose opinions are found in the Record, have declared to have been based upon fraud.

The Register and Receiver and the Commissioner of the General Land Office (the officers to whose satisfaction the statute required that the legal representatives of Hackley should establish their claim) found that the complainants were entitled to the land, and were especially impressed, as their opinions show, by the equity of these claimants.

It was only upon technical questions of law, as to which we have shown they were in error, that the Interior Department and the court below were enabled to decide this case against the complainants.

We submit that both law and equity demand that the court should correct these errors and award to the complainants that justice which has already been too long delayed.

Respectfully submitted,

WILLIAM H. LAMAR,
GEORGE H. LAMAR,
FRANCIS P. FLEMING,
FRANCIS P. FLEMING, JR.,
BEVERLEY B. MUNFORD,
EPPA HUNTON, JR.,
E. RANDOLPH WILLIAMS,
HENRY W. ANDERSON,
Counsel for Appellants.

OCTOBER 18, 1904.

APPENDIX.

APPENDIX.

(*Pre-emption Act of* 1826. *Congressional Debates* 1825–'26, *Volume 2, Part I., 19th Congress, first session, beginning Page* 1422.)

The bill giving the right of pre-emption in the purchase of lands, to certain settlers in the Territory of Florida, was taken up—Mr. Forsyth in the chair.

The bill having been read—

Mr. White, of Florida, said, if this were a subject introduced for the first time to the consideration of Congress, he should approach it with some embarrassment, not for the want of confidence in its justice, but, at the introduction of a new system of policy in the disposition of the public lands; and from a reluctance, which every one must feel, in proposing innovations on established law and usage. This is, however, no new proposition in the legislation of the country—it is coeval with the origin of our government; was practiced, previously, by the former Sovereign, in all the Colonies; is identified with our legislative history, and has been pursued, with unbroken continuity, with various, but unessential modifications, from the year 1788 to the present period. He did not perceive anything to justify a departure from it, at this time, either in the condition of the government or of the inhabitants of Florida. If there was anything erroneous in principle, defective in practice, or injurious in its consequences, it ought and would have been discovered and exposed long since; the fact, however, of its having received the sanction of all the administrations for upwards of thirty years, and of almost every successive Congress, is an undoubted argument in favor of its justice and policy; and it would be admitting the last sister into the Union most ungraciously, to deny her rights which the munificent legislation of the nation has conferred on every

other new State or Territory. Sir, I should not like to be the messenger of such unwelcome intelligence to a people proud to acknowledge the repeated evidences of your liberal and expanded policy; and who would not like to recur to so signal an instance of departure from precedent, so inconsistent with the liberal spirit that has characterized your legislation, and so blighting to their hopes and prospects. The policy of all the governments on this side of the Atlantic has been to extend their settlements as widely as possible, to attach the inhabitants to the country and their government, by giving them an actual share in the real property, that they might not, in times of difficulty, return the answer of the Roman people on Mount Aventine to the Ambassadors of the Senate. Pioneers and adventurers of new Colonies and settlements, formed under so many difficulties and privations, at the sacrifice of so many comforts, and contributing so many important benefits to the country, in increasing its facilities, extending its empire, and protecting its borders, have always been and ought to be rewarded. Influenced by these considerations, the governments of France, England, and Spain have made gratuitous grants of lands to their subjects, who improve, inhabit, and cultivate them. The exercise of this indulgence has been so universal that it is considered inseparable from the colonial state. The United States, recollecting the favors extended to themselves by the parent government, and animated by the same just and liberal policy, have not been less bountiful to their citizens.

A recurrence to the laws of the United States will demonstrate that the petitions of the people of Florida, upon which the Land Committee have reported this bill, are neither new or unreasonable, but that they have been sanctioned by numerous precedents. He conceived there were no reasons deemed sufficiently forcible to justify a departure from the system in Florida. Previously to making a particular reference to those laws, it might remove some obscurity, and obviate some objections, to notice a misapprehension of many gentlemen in regard to settlements on public lands. It has been alleged that the existing laws forbid settlements on the public lands, and denounce heavy penalties against all such intruders, who were located there without authority; and some call them squatters, which, so far as it is intended, as

either descriptive or derogatory, was entirely unjustifiable. These inhabitants are small planters, whose lands in the old States have been exhausted by cultivation, and who, animated with the laudable desire of improving their condition, and that of their rising families, have encountered all the hardships of penetrating to the borders of the country, disregarding the difficulties of the journey, and unappalled, either by the labors of the forest or the enemy in its bosom. Any imputations upon their motives, or question as to their right, would be the strongest censure upon our forefathers, who sought this continent, influenced by the same praiseworthy considerations. A more respectable population is not to be found in any of the States. If, however, sir, there was a law of the United States interdicting settlements upon the public lands, I could plead, as an excuse for them, the uniform legislation of Congress rewarding its violators, and quote the old maxim, *"Communis error, facit jus"*—he was fortunately, however, not reduced to such an alternative. The law does not prohibit such settlements, and he would show that the act of 1807, which was considered the basis of such exclusion, did not embrace this class of settlers; and, if it had, that law was practically repealed. That act, which is entitled, "An act to prevent intrusion on the public lands," provides that if any one shall take possession of, or attempt to survey lands ceded to the United States, he shall forfeit his claim, and the President may remove him by force. This law was passed not long after the cession of Louisiana to the United States, and its evident object was to prevent surveys of large claims, the validity of which were doubted, and to prohibit those having unlocated floating permits, from being surveyed and settled on the best plans of that rich territory, and hence they employ the phraseology, "forfeit his claim." The government was desirous of prohibiting by force, if necessary, the location of these floating and fraudulent claims, that the occupancy of them, after the change, might not be pleaded as a prescriptive right. Another consideration which probably impelled the enactment of that law, was to enable the President, in a summary way, to preserve the valuable timber, by the expulsion of intruders, without a resort to the tedious and protracted process of law, and the consequent destruction of the public

property in the meantime. It never was, and could not be, the intention of that law, or any other of the United States, to prohibit settlements upon the public lands. The Register was authorized to grant permits to settlers. The act of 1807 was re-enacted, in express terms, in that of the 26th of March, 1816—contains the same provisions, so far as the settlements were concerned, and superseded that act. This statute expired, by its own limitation, one year thereafter, in 1817, when an act was passed, obviously to remedy the defects of the other, and to provide more effectually for the same object. The necessity of one part having been dispensed with, in the adjustment of land titles, it was provided that the Secretary of the Navy, under the direction of the President, should lay off districts which might be useful for public timber, and, by proclamation, to prohibit intrusions on those reserved districts, under severe penalties; if any order of this kind has been made, or any district selected, and the public notified by proclamation, all who settled within the prohibited district would incur the imputation and penalty imposed by the act of 1807. Since the passage of the last act, there has been no authority given under the laws of the United States to Registers to grant permits, because none were necessary to authorize a settlement upon the public lands; they have, on the contrary, been rewarded by a privilege of purchase similar to what is proposed in this bill. This, however, gives as small a quantity as ever has been given, and smaller than has been accorded in many places, as a reference to the laws providing for the right of pre-emption will demonstrate. In Ohio, a grant of this kind was made to the United Brethren on the Muskingum; and one million of acres afterwards given to John C. Symmes, upon condition, which having failed, six hundred thousand acres were given to settlers at the government price, with the privilege of entering six hundred and forty acres by each individual. The same right was extended, by law, to the settlers at Gallipolis, and in the District of Cincinnati.

In Illinois, by an act of Congress, passed in 1814, after donations had been given by law, the right of pre-emption is given, up to February, 1813, of not less than one hundred and sixty, nor more than six hundred and forty acres—in Indiana, up to

1813, both subsequent to the law of 1807. In Michigan, to 1804, with other indulgences to the settlers. In Mississippi, after great liberality in granting donations, pre-emptions were allowed up to 1807, and the purchasers given to 1813 to pay for the lands. In Missouri, Louisiana and Arkansas, the same rights were given to settlers. It is manifest, sir, from a reference to these laws, that the system has been adopted and continued almost uniformly in all the States and Territories where there were public lands, and if it was inexpedient, why has it not been arrested before now? All that is solicited for Florida is what has been granted elsewhere. This bill does not provide to the same extent that others have; in Louisiana and Mississippi, these rights were given to settlers for ten years after the change of government. The country he had the honor to represent was surrendered in 1821; this bill only provides for four years instead of ten; in some others they were allowed three hundred and twenty and six hundred and forty acres of land, and, in most instances, time has been given for payment. By the terms of the bill under consideration, they have the right of purchase for one hundred and sixty acres, for which they pay cash. This, sir, is a most reasonable request, as is shown by the foregoing comparison; if it is granted, as it is an exercise of bounty, the people of Florida will not stop to inquire what has been done elsewhere, but offer their sincere benediction for the government that has protected their families in the enjoyment of their homes, in the formation of which they have expended their only means of purchasing in competition with others, attracted by their improvements.

Are there any circumstances or difficulties connected with the settlement of Louisiana or Mississippi, to distinguish them from, or give them a preference over, this Territory? If there was any difference in point of peril and privation, it was on the side of Florida. After the change of government, the present inhabitants travelled from the Southern States several hundred miles through the Creek nation, or around it, through forests, cutting roads and constructing bridges, swimming creeks and rivers, and, after their arrival, for the first two or three years, were under the necessity of purchasing provisions at three or four times the amount they now cost.

Is it equitable or proper, that men who have encountered all these difficulties, submitted to these dangers and privations, and furnished these facilities for others to get into the country, should be put into equal competition with those who have made no expenditures, and availed themselves of the conveniences of their more intrepid pioneers? Is it just, sir, that one who has, by improving the country, increased the value of all the contiguous lands, and whose labor alone has given additional value to the spot on which he has located his family, shall be expelled, without any equivalent, from his home, by affording to the ruthless speculator an opportunity to buy it over him? Sir, some have pretended to doubt the policy of these laws from the beginning. I would inquire of such, how would you ever sell these frontier lands without roads and settlers? If any gentleman supposes that, upon an enlarged view of this subject, the United States will lose by the passage of this law, he will be greatly mistaken, unless they avail themselves of the labor of those adventurous citizens, without a fair equivalent. The value above the government price is derived from their labor, and the means they have furnished in penetrating the country. See the returns of the sale in Tallahassee; refer to the price of lands in the States; when it sells for twelve dollars per acre, ten of that is derived from the improvement, because land in its vacant state requires that sum to improve it. I do not hesitate to believe that the land, in the state in which these settlers found it, was not worth more than the sum they are required to pay by this law. It is a sound principle, in politics and ethics, that he who benefits the public is entitled to his reward. That the country has been greatly improved by the labors of these individuals, cannot be denied; and what will be their reward if this law does not pass? Their means of purchasing have been exhausted in the improvements of the country and the high price of provisions; and the inevitable consequence will be, that they will be turned from their houses, forced from their plantations, by the rapacity of the heartless speculator, with but an inconsiderable augmentation to the treasury. You cannot conceive, sir, the distress that it will occasion. They have, on account of the causes enumerated, but moderate means. They cannot enter the lists of competition with

those who are attracted by their improvements, the result of toil and labor, in which they had no participation, and for which they feel no sympathy.

Mr. W. could not, in justice to the subject, dispense with the necessity of informing the House how these things were managed. A sale of public land is advertised; the sharpers of the adjoining States—strengthened by the aids of usurers and banks, clubbed together their funds—flocked to the country like vultures, at "death's prophetic knell," traverse all the roads made by the honest settler; survey the whole district; take notes of every well-improved place; ascertain whether there is a spot endeared to a planter, on account of its containing the bones of a wife, child, or friend; and when the sale begins, the planters are informed privately, that, unless they pay so much to this "holy alliance," their farms and houses will be taken from them. The unpleasant alternative is presented, either to tender the bribe or abandon the possession. If it is given, either in money or in bond, all others are forbidden to bid for the land, and it is purchased at the price proposed in this bill, from the United States, and perhaps the same sum to the company. Should it not be given, the land is purchased for a few dollars more than the means of the honest settler, who is sacrificed, and the public treasury augmented a few cents. It is to prevent this vile bartering, or the consequent injuries to those who will not engage in it, that this law is desirable. Such were the excesses to which these practices were carried in the southern part of Alabama, that their courts were crowded with suits upon notes of this description. Instances equally distressing have occurred, and will again occur, in Florida.

By the passage of this law, you save from ruin an industrious, enterprising class of men, who have confided in your munificence, from a knowledge of your long-continued legislation on the same subject. It is also important from a political point of view. The lands on our borders and frontiers should be occupied by men who are competent and willing to repel the first invasion of our country. Should this class be driven from the lands, and they were succeeded by the quarters of Southern planters and speculators, what will be our condition in time of war? It is impor-

tant that small planters should be encouraged, and a dense and efficient population invited and encouraged, at the limits of the Confederacy, devoted to the government, by a grateful recollection of its favors. One successful sortie of an enemy, and the occupation of a favorable point, might cost the government more than all the lands in a district would sell for to remove him.

In every view of the subject, precedent, good faith and policy, in my humble judgment, this law ought to pass.

Mr. Whipple said, he had some doubts as to the propriety of this mode of legislation. He did not, however, rise for the purpose of opposing the bill; but he objected generally to the extension of the pre-emption system. It would be recollected that provision had already been made, by donation, for all those who settled in Florida up to the time of its cession; but the present bill goes farther, and grants to those who settled on the public lands after the cession, the privilege of purchasing at the minimum price for a period of four years. He thought this course was impolitic, and that this right of pre-emption ought to be restricted because its practical tendency was to encourage the intrusion of unauthorized settlers on our public lands. Those settlers were in the habit of selecting the very best of the land, and of fixing themselves upon the soil, and when afterwards the lands were exposed for sale, they say it is unjust to eject us; we have made improvements; and they insist upon having the best and the richest of the land at the very lowest price the law will allow. For himself, he thought that this was a very questionable policy; but if the House were inclined to sustain it, he should make no opposition.

Mr. Owen observed that this was a proposition that certainly could not stand in need of debate. It was not at this time of day to be settled, whether this government will or will not pursue the course of policy to which the gentleman had alluded. It had already been adopted and long pursued. This very bill, after being last year sustained both by the Committee on the Public Lands, and by the Committee on Private Land Claims, passed the House. The policy was adopted long since, and the doctrine advanced by the member from New Hampshire might almost be said to be now universally exploded. The donation lands to which the gentleman

had alluded, were given to the former settlers in Florida on a principle of individual right. If they had not been conferred by this government, the settlers would have obtained a title from the government under which they formerly lived; it was, therefore, only an act of justice, and not of liberality. But, on the question of policy, he held an opinion directly the reverse of that which had been expressed by the gentleman from New Hampshire. He thought it was our true policy to grant to those who settled on the lands the right of pre-emption. It was their labor which gave value to the lands; without it they would have had none. He considered it wise to encourage those who might, with propriety, be termed the pioneers of a more dense population. It was they who, by braving the dangers and overcoming the difficulties of an unsettled country, opened the way for the introduction of capital and all the improvements of civilized existence. As to what the gentleman had said of their selecting the best points, even admitting it to be true, their number was comparatively few, and abundance of the best land would still be left. But, from his own experience, as having been himself one of these pioneers, he was disposed to believe that the fact was the very reverse of this. It was true that new settlers, if intelligent, selected those points which invited most advantages for a new settler; but, as they had to choose them in such a situation only as would admit of their sustaining themselves till they could make further progress in improvement, they were not at liberty to range through the whole of a body of public lands, and pick out those portions only which contained the most fertile soil. These settlers were, for the most part, already drained of all the money they had, by payments into the public treasury. Would gentlemen wish to deprive them of all their earnings? In Alabama, the proceeds of what they paid into the treasury was equal to the whole amount of staple commodities they had hitherto been able to raise. They had literally been laboring for the government, and the same state of things existed in Florida.

Mr. Cockey said, that his vote on this occasion would be regulated by one consideration alone: if it was proposed to extend a greater boon to the settlers in Florida than had been bestowed on those in other States, he should be opposed to the bill; if not, he should vote in its favor, unless some reason could be given.

Mr. Whipple replied, that the extent of time during which this right of pre-emption was given to settlers in other Territories, was greater than that now proposed. He wished to correct one misconception of the gentleman from Alabama. It was true that the bill had been reported to the House at the last session, but the chairman of the Committee on Public Lands, and two other members of that committee, were opposed to the principle on which it was founded. As to the donation rights in Florida, the gentleman was also mistaken. Commissioners were appointed, to whom the claims of settlers were to be committed; and, where the evidence in their favor was incomplete, if the Commissioners thought that the claim would be confirmed by the Spanish government, they reported in favor of them. Pre-emption rights went on a different ground. They were to be given to persons who had settled since the cession of the Territory was openly known, and who knew that the land on which they settled was public property, still, however, as the government of the United States has seen fit to grant such rights to others, he should not oppose their doing so in the present instance.

Mr. Scott said, that if this were to be the beginning of the pre-emption system, it was very possible that the Committee on the Public Lands would not be in favor of its adoption. But, when the right now to be given was compared with that which had already been given to others, he saw no reason why it should be refused to the settlers in Florida. In Missouri, the right of pre-emption originated in 1800, and he did not know a single instance where it had been refused. In Michigan, in Mississippi, and in Arkansas, the right of pre-emption was extended to ten years; but this bill gives it for five years only; and although it is admitted that they made their settlements contrary to the acts of 1804 and 1807, forbidding settlements on the public lands, yet the House had so far superseded the law as to give pre-emption rights to those who had violated it, and there was no reason why a difference should be made between settlers in one Territory and those in another.

Mr. Cook was about to address the House, when—

The Speaker suggested that, as there was no opposition to the bill, the debate was consuming time to no purpose.

Whereupon, the question was taken upon ordering the bill to be engrossed for a third reading, and decided in the affirmative.

And the House adjourned.

WEDNESDAY, February 22, 1826.

* * * * * *

The engrossed bill, "granting the right of pre-emption to certain settlers on public lands in the Territory of Florida," was read a third time; and the question being, "Shall the bill pass?"

Mr. Vinton said, that he was fully aware that a privilege similar to that now proposed to be conferred on these settlers in Florida, had already been granted to others not more meritorious than they. But, from his experience and observation as one of the members of the Committee on Public Lands, he was entirely satisfied that we must break down this system of pre-emption granting or it would break down the land system. The basis of that system, as originally intended, was that the lands ceded by the several States to the general government, should be parted with by sale only, and in this way regulate and direct the settlement of the country. Pre-emption and donation rights had, however, been granted for various purposes: some had their origin in the charity and sympathy of Congress; some for purposes of education; others for the encouragement of religion. Concerning this entire class, whatever might be his opinions as to the expediency or wisdom of such disposition of the public property, he should at this time say nothing: they rested on their own particular merits. But, said Mr. V., there is a class, both of donation and of pre-emption grants (and that class which embraces the case of the bill), which leads to consequences the most prejudicial to the interests of the country. These persons to whom you are now called upon to grant pre-emption rights, are naked trespassers, who, entering without a shadow of right, upon the public lands of the United States, selected the very choicest portions of those lands for themselves, and now come before this House, without even a pretense to any title whatever, and ask for countenance and reward from the government. Congress had passed laws forbidding all trespasses on the public lands; but, if it had

not, the natural principles of right, the universal law of property, forbid any man from appropriating public property to his own use, without the consent of government. The contrary principle, if pushed to all its legitimate consequences, would end in the annihilation of all public property, and the supervision of all government.

It was said yesterday, in the course of debate, that we are now bound to go on as we have proceeded, because we have extended this same benefit to others, not more meritorious, nor any less culpable, than these. But this fact, so far from being an argument in favor of passing the present bill is, with me, precisely the reason, and the strongest of all arguments, from the accumulating force of the example, why we should not pass it. We have, it is true, gone to a great length in this species of legislation, and, if we proceed much further in it, the system will have accumulated, from precedent, a force and impetus which cannot be resisted; and, because we have encouraged and rewarded trespassers, we shall be held obliged to encourage and reward them, so long as we hold an acre of public land. Let gentlemen recollect that, in the course of time, the whole of that vast region which lies west of the Mississippi, will come to be settled under the operations of the land system of this government. And I think, when this is duly considered, the House must be satisfied, that they have gone far enough already—that it is high time to stop and arrest this course, before it leads to the entire prostration of our landed system, by our people running over the country in the wildest and most irregular manner. It is idle to talk about the claims of trespassers. No trespasser has any claim. The gentleman from Florida is certainly mistaken when he says that this system has been acted on ever since the year 1788. In the course of the remarks made yesterday, in support of the bill, reference was had to pre-emption rights granted in Ohio to those who held under John Cleves Symmes, and to the donation granted to the Moravian settlers, and those in the Cincinnati district. The cases are by no means analogous, and furnish no just precedent for the present bill. The persons for whom this bill has been brought into the House, are trespassers; but those in the cases referred to, were not trespassers at all. The grant to the Moravians was made

at two different times. By the first act, three townships were given to certain Christian Indians, or for their benefit; and by the second act, ten thousand acres of land were given to the Moravians, residing at Bethlehem, in the State of Pennsylvania, in trust, as a fund to be devoted to the civilization and Christianizing certain Indian tribes. Were these Moravians trespassers on your public lands? They did not reside within hundreds of miles of them. They lived on their own property, in the heart of Pennsylvania. As to the pre-emption right granted to settlers on the tract sold to John Cleves Symmes, they rest wholly on equitable considerations. The United States sold a million of acres to Symmes and allowed him some time for the payment. He immediately went on to the tract he had purchased, and commenced selling out the land in lots to the settlers. These settlers honestly paid him for their land, and at very high prices too, he believed, and then improved it. Symmes afterwards failed in his contract, and, in consequence, the tract reverted to the United States; and these settlers might have been turned off—but the government, from principles of equity, allowed each settler to retain a lot of one hundred and sixty acres, at the price of two dollars per acre. Were these trespassers? They paid for their land twice, and had gone lawfully into possession. Did these men go roaming over the public lands, and settle where they pleased, upon the choicest land, without a shadow of title—upon land worth perhaps ten, twenty or thirty dollars per acre, and then come here for reward? No, sir; they were the *bona fide* purchasers of the land they held; and, as to the Cincinnati district, the grants there were to persons who had purchased from Symmes. It is, in fact, only a different part of the same case. Not a single instance could be pointed out, in Ohio, in which trespassers had received the smallest encouragement; much less, the bounty of government, for violating public property — it never had been asked for them—they had been left to their fate.

He would now say a few words as to the effect of this pre-emption right. It had its first rise in Louisiana and Missouri. He would begin, however, in Michigan, and passing through the Territories, would show what had been its consequences. Some four or five years ago, an act was passed granting donation rights

to all persons who had settled in the county of Mackinac, previously to the year 1812, on condition that they should prove that they had submitted to the laws of the United States, and acknowledge their allegiance to this government. It was known there were persons there who were aliens, and had served with the enemy during the war. The Commissioners, before whom those proofs were to be made out, by some extraordinary process of reasoning, came to a decision that no proofs should be required of this, on the part of the settlers, but that they would wait until some person came forward, produced a record of the conviction of the settlers, of the crime of treason, or some other violation of law. Some time after that, a military post was established at the Sault of St. Marie, which rendered this place of some importance—and what was the consequence? It appeared, last year, in evidence produced to this House, that, with the exception of one or two, all the persons who had received these donations were either British subjects, or had actually borne arms against the United States. And the leading claimant among them was the very commander who led the party that took the post at Machillimacinac, and let in that flood of Indians who covered our frontiers with blood, and who were the authors of some of the worst evils and barbarities of the late war. These Commissioners had recommended for confirmation, donation rights to those persons who were intended to be excluded by the law, within the very pickets of our military posts at that place; and the consequence was, that the troops were compelled either to purchase their wood of these persons, or to go a distance of two or three miles to obtain it, in this inclement country.

What was the state of this matter in Arkansas? A few years ago the United States made a treaty with the Cherokee Indians, by which that tribe was to receive a quantity of land (far beyond the public surveys or any known settlements) on the west side of the Mississippi, equal to that which they should give up on the east side of that river. But when the Indians, in compliance with this treaty, removed to the West, they found on the lands which had been ceded to them, hundreds of white settlers, who had settled there without any title, but who came into this House and demanded pre-emption rights; and, at the first session of

the last Congress, those rights were granted to them. A treaty was afterwards made with the Choctaws for a similar exchange of lands, and when they went to occupy the tracts assigned them, they found upon it settlers (which he had heard estimated to amount to between two and three thousand) who were unwilling to surrender the land on which they had trespassed; and during the whole of the last winter a delegation of that nation were in attendance at the seat of government, endeavoring to obtain the removal of these intruders, or make arrangements about them. Great difficulty and embarrassment was produced by their application, and I believe they had not been put into possession of their lands, or any adjustment effected.

In Louisiana these pre-emption rights were extended to ten years. A session or two ago, a gentleman from Louisiana had called for information, why a certain district of country in that State had not been surveyed and brought into market? The inquiry produced a long correspondence between the Surveyor-General of the district south of Tennessee and the Commissioner of the General Land Office, in which the former stated that Congress had so often extended the time for persons who held donations and pre-emption rights, and other claims, to make proof of them, as to render it impossible that those districts could be surveyed and brought into market; and in his correspondence the Surveyor-General minutely details a system of fraud and perjury, so extensive as almost to exceed credibility; and he concludes with same, that Congress have only to go on to pass one or two more laws, such as they have passed, and the residue of the lands belonging to the United States, in Louisiana, will not be of sufficient value to pay for the surveys. It is very easy in this way to grant away a whole State before we are aware of it.

In Florida, Congress had confirmed to settlers all the lands held by them at the time of the treaty, by which Florida was ceded, whether the settlers had title or not. A subsequent bill had been reported, by which six hundred and forty acres were proposed to be given to each of those who settled on the public lands, between the making of the treaty and the actual surrender of the territory to the United States, by which bill, which, in analogy to other acts, ought to pass, not less than eighty thousand

acres of public land would be given away. And now a bill is introduced, which gives to every man who may have run over the public lands for five years, and choosing out the best spots for himself, a right to pay for it at the minimum price. No man knows the number of these persons, and the gentleman from Florida has not undertaken to tell us. If anything, surely, was calculated to encourage the most wanton trespassers on our public domain—to break down our whole land system—it was this. They had retarded the sales of land, prevented the public surveys, interfered with the execution of our public treaties, and made war upon our military posts. These trespassers were ready, as appeared from these things, to throw a clog in the way of the movement of every wheel in the government. Our land system, as at first devised, was an excellent one. Experience demonstrated it to be framed on principles of practical excellence and expediency, and its effects have been highly beneficial to the public interests in Ohio, where it has been carried into strict and undeviating execution. But, if the course is persevered in, of granting these pre-emption and donation rights, that system will be virtually broken down. Congress are necessarily ignorant of what is taking place in that part of the public lands which lie beyond the portion surveyed. They do not know how many persons are engaged in seizing on the public property; and when they pass a bill like that now before them, they continue ignorant of the magnitude of the grant they have made, until they find some of its effects interfering with a subsequent movement of the government. They then become aware, for the first time, of the extent or amount of their own grants; but then it is too late to correct the error. Unless the government shall stop this encouragement to unlawful settlements, it is easy to foresee that the whole country, west of the Mississippi, was destined to be settled in the most irregular and objectionable manner, to become a prey to the yearnings of cupidity. He held it to be most important to the public good, that this whole business of settlement should be strictly regulated, and should be kept by the government under its own control. The inevitable effect of any other course would be a mischievous interference with our relations with the Indian tribes, and to put the settlement of the country entirely beyond the control of the

government, which ought to be known and regulated by policy. He had not made these remarks out of any particular hostility to the present bill, but from a general conviction of the impropriety and injurious tendency of this course of legislation—making the invidious distinction of rewarding one man for his trespass, and making another pay for his lawful possession. If the House are of opinion that the present course ought to continue, then they ought to pass the present bill; but, if they thought otherwise, they ought, undoubtedly, to refuse it. There were hundreds of trespassers on the public lands in Ohio; nor could he see why trespassers in Ohio or Indiana, in 1824, were not entitled to the same boon as trespassers in Florida, or trespassers in Michigan or Missouri. If any are to be encouraged and rewarded, remove all barriers; abandon all care of your public lands; and let all manner of persons enter upon them, and take what and where they choose. The consequence of which will be, one universal scramble for the whole country, to the Pacific, the evils of which to the government and the real settlement and prosperity of the country he should not attempt to depict.

Mr. White, of Florida, said, after the explanation which had been given of the principle and policy on which the bill now under consideration was founded, and no amendment having been proposed in Committee of the Whole, he could not have anticipated such formidable opposition on its final passage, and particularly from the gentleman from Ohio. He has said, it was time to break down the system, and denounced all who are intended to be embraced by this bill, as trespassers on the public lands; and has also asserted that their improvements cover all the good land of the Territory. He denied that either of the propositions were correct. The inhabitants, whose rights were intended to be secured by the passage of this bill, were not trespassers. The act of 1807, entitled "An act to prevent intrusion upon the public lands," was passed shortly after Louisiana was surrendered to the United States. There were, at that time, numerous unlocated claims, derived from the French and Spanish governments, founded on permits, requests, and floating concessions.

That act was intended to prevent the location and surveys of those incomplete titles, and at the same time to authorize the

President of the United States to preserve by force, if necessary, not only the domain, as this government acquired it, in the treaty with France, but also to invest him with discretionary power to prevent these locations of claims, many of which were considered invalid, and in the hands of those who did not intend to become citizens of the United States, the pretext for locating which, might have led to serious disturbances, in the condition that country was in at that time. Another consideration, which induced the passage of that law, was the preservation of the public timber on the lands of the United States.

It never was either the intention or policy of the government of the United States to prohibit settlements on their vacant lands; on the contrary, they have encouraged it, by a long-continued system of legislation, both before and after the act, to which, alone, the gentleman must refer, in pronouncing them trespassers. By the provisions of that act, the Register of the Land Office was authorized to grant permits of settlement to every American citizen who should apply for that privilege. Does this look like an intention of the government, at the time of the enactment of that law, to interdict settlements on the public lands? No, sir; neither that law, nor any other to be found in the statute book of the United States, will justify the statement of the gentleman.

In the act of 1818, the same provisions are incorporated, and the same permission given. That act expired in one year, and with it expired the only law then in force, or which has been subsequently enacted, to provide for granting permits to emigrants settling upon public lands. Every citizen, looking to the history of our legislation, feeling himself justified by established precedence, and in the absence of any prohibition, could settle anywhere on the public lands he thought proper, without incurring the imputation of trespassing, or the penalties of intrusion.

From the expiration of the act of 1816, in the year 1817, to the present time, there has been no law interdicting settlements on the public lands of the United States.

One of the great objects in the act of 1807, the preservation of the public timber, was provided for in another and better mode in 1817. He alluded to the law authorizing the Secretary of the Navy to reserve certain districts, which might, in the esti-

mation of the Executives, be useful for timber. With this enactment, and the final adjustment of land claims in Louisiana, terminated the law, and its necessity, under which the gentleman has considered it proper to denominate the citizens for whose benefit the law was intended, as "intruders and trespassers"—appellations which neither the law, nor the character of the inhabitants would authorize as appropriate or descriptive.

The gentleman says we have gone far enough; it is time to stop. Sir, he ought to have been here thirty years ago, when you were voting away such extensive donations to the State he represents; his arguments might have been more forcible then than now; but how does the account stand? Ohio has gotten all that she could ask, and it is time to stop; "the system is a bad one." Is this consistent with the quality and propriety that should characterize the legislation of this great nation? Ohio has been satisfied, and it is time to stop. The gentleman has attempted to explain how these grants were made to the State of Ohio; and, however ingenious he may be, and is capable of being, in the explanation, he cannot separate it from the present bill. One million of acres of land was given to John C. Symmes, upon certain conditions; they were not complied with; the land reverted to the United States, and, by law, six hundred thousand acres were given to purchasers at the government price. Yes, sir; by a law of Congress; and the gentleman attempts to explain it by saying, that they were purchasers under Symmes. Does this constitute any equitable or legal claim on the United States? Whatever might have been their demands on the original grantee, they assuredly had none on our government; and this act in favor of Ohio, was a bounty of six hundred thousand acres to them, on the same terms that this bill proposes to give one or two hundred to the settlers in Florida. If that gentleman could have been here, and by the power of his arguments prevented the passage of that law, he would have saved more to the government than will be saved by preventing the passage of this. But is this all that has been granted to Ohio? Sir, I have taken a note of all the laws which have been passed on this subject, and I find in that catalogue a grant to the "United Brethren," in Ohio, on the Muskingum; a grant to French settlers at Gallipolis; I find

also a grant to settlers in the Land District of Cincinnati. How much has been given to this favored State by all this munificent legislation, I have not taken the trouble to estimate; but since Ohio has received all that she can get, and is now rich and powerful, "it is time to stop." We have gone far enough. Sir, this logic may suit that gentleman, but it would sound most ungraciously in the ears of those I have the honor to represent; and would have been, some years ago, most unwelcome intelligence to those he now represents. The gentleman has told us of the abuses which have been practiced in Michigan and Louisiana under laws similar to the one under consideration. If such have existed, it is the misfortune of the government and its agents. It does not grow out of the system itself, and is no argument against its propriety. If he had read this bill, however, with his accustomed perspicuity, he would not have anticipated any such results as he has deprecated, in regard to the obstructions of the surveys.

This law cannot create any such inconvenience. It proposes to give to each settler a quarter section of land, at a specified price, to be bounded by sectional lines, if the surveys are completed; if not, to be bounded in the same way when they shall be completed; and, in this way, all the difficulties in regard to the surveys are obviated.

Sir, I do not ask for the people I represent more than has been conceded elsewhere, and it is difficult for me to perceive the faults or propriety of adopting an uninterrupted system, continued and uniform, sanctioned by nearly every Congress for thirty years, and when you reach the most exposed and frontier country of all your new Territories, say it is time to stop. We are told, however, that, by a law passed, and one in contemplation, eighty thousand acres are already given. The donations up to 1819, when the treaty was concluded, were only eighteen in number, as will be seen by the reports of the Commissioners; and I do not believe that the land, if sold, would pay for the surveying. The other class in contemplation, in Escambia county, where the greatest number reside, is of the same character. Those further east are more valuable; but admitting that the whole was good land, and add to it that proposed to be embraced by this bill, then

how will it compare with the six hundred thousand acres in Ohio? This, however, is not to be considered as purely a donation. By the regulations and ordinances of the Spanish authorities, in force in Florida, every person who settled in these provinces, and inhabited and cultivated the land for a particular number of years, was entitled to a gratuitous concession from that government; and by the treaty between Spain and the United States, the latter covenanted to confirm all title to the same extent that would have been confirmed under the Spanish government. The actual occupation under that government has always been considered as constituting an inchoate right, or equitable title, to be perfected in the same manner that such titles would have been under the Spanish government. Upon this principle, the United States have adjusted all the equitable, as well as legal claims, up to the change of government. Such were the laws for Missouri, Mississippi and Louisiana. The pre-emption laws have originated from considerations entirely different. I have shown, in the remarks I have the honor to offer in explanation of the objects of the bill, on yesterday, what was granted in Illinois, Indiana, Michigan, Missouri, Mississippi, and Louisiana. The gentleman says there are no recent instances, and that it ought to be stopped. In Arkansas, I think so late as the year 1823, or 1824, Congress passed an act giving pre-emption to all the settlers embraced in a treaty with the Choctaws, anywhere in that Territory—Cherokees, I am informed by the honorable gentleman from Arkansas—and in lieu of pre-emptions granted by an act of 1814. I thank the gentleman for the information, but it does not alter my argument. It is to show that this House have recently legislated upon this subject, and the extension that we contend for has been granted to Arkansas. The gentleman is equally mistaken in supposing that this law will cover all the good lands. The Indians were removed in the fall of 1824. This bill extended a right of preference in purchasing, to the first of January, 1825. It would be most surprising if many could have "inhabited and cultivated" the lands occupied by them until October or November, 1824, before the first of January, 1825. Besides, sir, if that were the fact, I contend that the government of the United States have no equitable or moral right to more than the lands are worth, in their unimproved state.

The gentleman has attempted to give an estimate of the lands and their value; let him look to the returns of the sales of unimproved land in the vicinity of the seat of government; it did not average two dollars per acre in the immediate neighborhood of Tallahassee. This sale will demonstrate what lands are worth in the woods. It is proper, however, to remark that there were other causes, which, in some measure, produced this result. If, then, sir, the lands on which these settlers lived are worth more at this time, from what is it derived? Their own labor; and is it just that the government should appropriate the labors of its own citizens to fill its coffers? Sir, it would be making slaves of the most deserving of your population. If the land is worth one dollar and a quarter, or two dollars, in the woods, and it costs ten dollars to clear it, is it fair, honest, or magnanimous, to take from the settler, encouraged to locate himself there by your laws, more than the value of the land in its unimproved condition? Look, then, to the sales in the woods in that country, and you have the estimate, and very near to the sum proposed to be given by this law. Mr. W. said he had attempted on yesterday to prove that the United States would make but little by the refusal to pass this law, whilst this deserving class of inhabitants, who have cut roads, constructed bridges, and felled the forests, would be placed at the mercy of a class of speculators, who are so well disciplined in the arts of their profession, and so familiar with the distress they have occasioned, that the people have as little hope of compassion as from an Inquisitor, or mercy from a Shylock.

It is impossible to prevent combinations at those sales. No matter what the demand is, to a certain extent it has and will be continued. By passing this law, the individuals who are embraced by it (and their numbers have been greatly exaggerated) will be secure, and the government have a fair equivalent for the land in the state they found it—when you take in connection the increased value of the land around their settlements, in consequence of the facilities they have created to get them, and the comforts and conveniences they afford to new emigrants. Whenever improvements are found to be valuable, the company of speculators, through their foreman, notify the farmers, whose

means of purchasing have been exhausted in the improvement of the country, and in purchasing every article at four times its present price, that unless he will pay so much to the company, they will bid for the land, against him. In this way the honest planter is obliged to compromise, and perhaps pay them as much as the government, or be sacrificed.

It is to prevent this, sir, that this bill is intended, and to reward the enterprise of your adventurous citizens, who have encountered all the perils and difficulties of a settlement in that country. Another consideration has great force in recommending the passage of this bill. Florida is your most exposed frontier, having an extensive seacoast. It is, therefore, the policy of the government to have as dense a population as possible, and every advisable means should be adopted for that object. Should the lands fall into the hands of speculators, or large planters, who will quarter their negroes near your borders and coasts, the consequences will be equally injurious to the population of the Territory and the security of the country. For these reasons, sir, and those I had the honor to submit on yesterday, I trust the bill may pass.

The question was then taken, and the bill was passed, and sent to the Senate for concurrence.

SUPREME COURT OF THE UNITED STATES.

October Term, 1894.

No. 92.

SALLIE FIELD SCOTT, ELIZA MADISON SCOTT, HARRIET B. JONES, ET ALS., Appellants,

vs.

LIZZIE W. CAREW, W. W. HAMPTON, E. H. GADSDEN, ET ALS., Appellees.

REPLY BRIEF OF SOLICITORS FOR APPELLANTS.

WILLIAM H. LAMAR,
GEORGE H. LAMAR,
FRANCIS P. FRIERSON,
FRANCIS P. FRIERSON, JR.,
BEVERLEY B. MUNFORD,
EPES HUTSON, JR.,
E. RANDOLPH WILLIAMS,
HENRY W. ANDERSON,
Solicitors for the Appellants.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1894.

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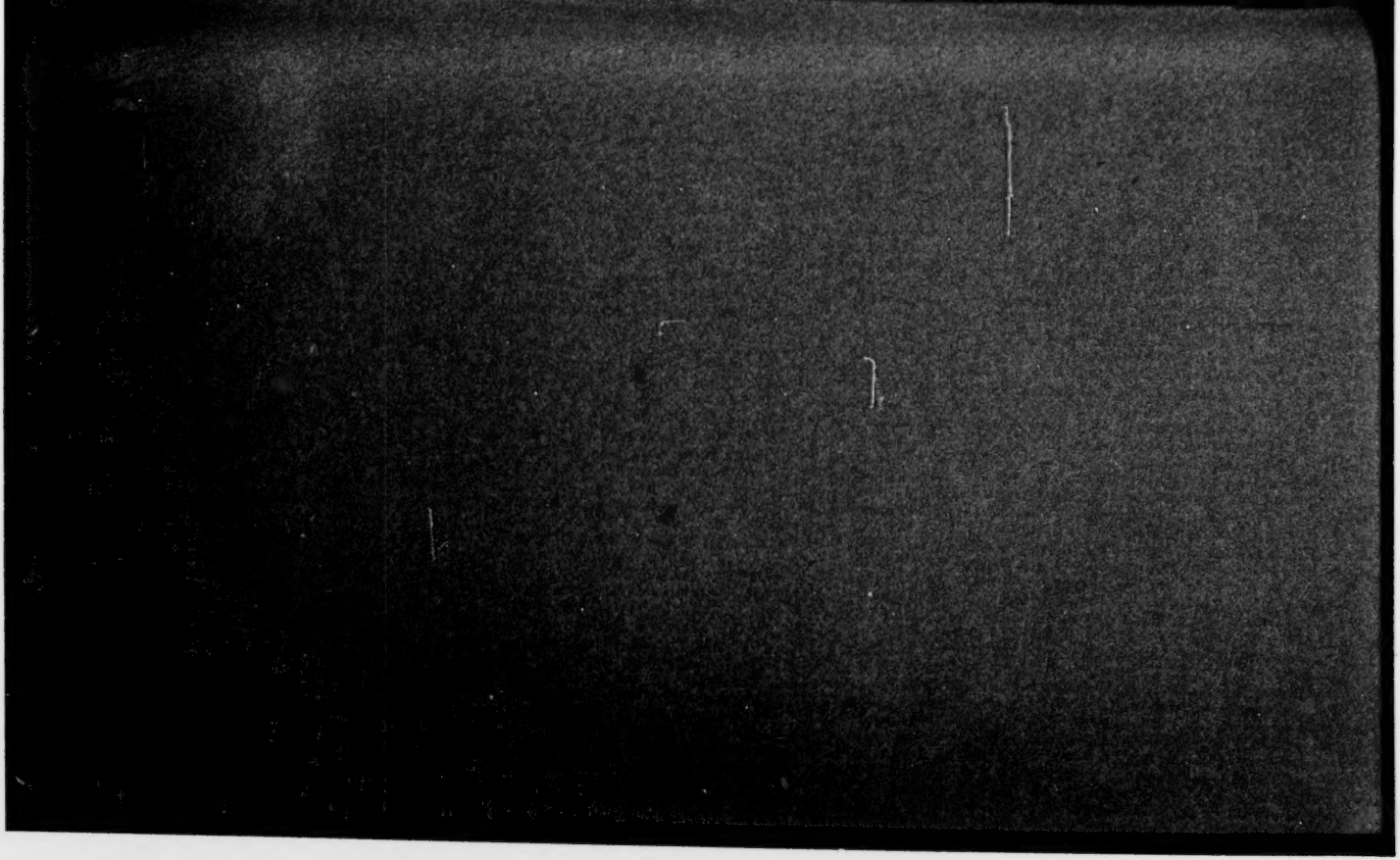

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 52.

SALLIE FIELD SCOTT, ELIZA MADISON SCOTT, HARRIET B. JONES, ET ALS., APPELLANTS,

vs.

LIZZIE W. CAREW, W. W. HAMPTON, E. R. GUNBY, ET ALS., APPELLEES.

REPLY BRIEF OF SOLICITORS FOR APPELLANTS.

At the outset of our reply brief we decided to consider the contention of counsel for appellees that the case of the appellants is barred by laches or by the expressed terms of the statute of limitations of Florida.

I.

THE DOCTRINE OF LACHES.

This question has been considered in our opening brief, pages 160 to 170, and to the discussion therein the court is now referred.

As we understand it, it is an established principle, so elementary as to require no authority, that time is only one of the elements by which the court is guided in the application of the doctrine of laches, and that the rights of a claimant will not be held to be barred by laches unless, in the light of all the facts and circumstances of the particular case, such holding is most equitable and most nearly accomplishes the ends of justice.

In arriving at its conclusions upon this question, the court will consider the time which elapsed from the accrual of the right of action to the date when the suit was brought; but it will consider also the status of the property in question, the position of the complainants, and any facts which would tend to excuse a delay or to make it inequitable to apply the principle.

In this case it is contended that Mrs. Carew has conveyed this land to other parties, and that it would be inequitable to enforce the right of the claimants as against the grantees.

As a matter of fact, it is alleged in the bill that Mrs. Carew was herself, at the date of the institution of these proceedings, the owner of the greater part of the land in controversy, and that she had made certain conveyances. The first of these was to her brothers in the State of Georgia, made before the patent issued or the right of action accrued to the appellants, and we cannot avoid the inference from the facts and circumstances of that conveyance, as set out in the bill and the subsequent quitclaim by her brothers back to Mrs. Carew in 1900, that the real purpose of this conveyance was to place the legal title of this land in other parties residing in a different State, with the consequent embarrassments to appellants in pursuing their rights in the courts.

The other conveyances mentioned were principally to the attorneys for Mrs. Carew, who represented her in the Interior Department or subsequently; and it is expressly alleged in the bill, as to each of these conveyances, that they were made without any actual or real consideration, with full knowledge of the rights of the appellants and for the purpose of defeating the same, all of which allegations are admitted on demurrer.

If, however, it should develop in the further progress of this case, after evidence is taken, that any of these grantees are *bona fide* purchasers, or that they hold the land for value and without notice, or that they hold the land with equities greater than the complainants, then their rights cannot be disturbed, and the Hackley heirs, if originally entitled to recover, would merely have lost by the delay the lands now held by such grantees as do occupy this strong position. There is nothing in this record, however, to show that Mrs. Carew or any of the attorneys who have taken grants of this land have been in anywise injured by the delay of a few years. There is nothing to show that the value of this land has changed in any respect since 1896, that any improvements have been made thereon, that there has been any loss of evidence upon which the defense is based, or that the position of the defendants in making the defense has been in anywise prejudiced by the delay in bringing this suit; and it is respectfully submitted that, where none of these conditions appear, it will be difficult to find a case where the court has applied the doctrine of laches to defeat a claim resting upon a strong legal right and an equally strong equitable consideration.

In addition to these facts, it would have been little less

than folly for the appellants to have brought the suit against the patentees so long as proceedings were pending in the Department looking to the cancellation of these patents, and this question was not decided until about two years before the suit was brought. It might have been, if the proceedings had been instituted by the complainants, that when they secured a decree for the conveyance of the legal title by the appellees, that title would have been canceled in proceedings instituted by the United States; and, until the question as to whether such proceedings would be instituted was settled, it would have been at least unwise to begin the contest in the courts.

It is suggested, however, that if the Government had instituted proceedings to cancel these patents the appellants would not have been benefited thereby, and therefore it did not interfere with their bringing this suit. To the contrary, if these patents had been canceled all parties would have been thrown back into the Interior Department, and the appellants might have reasserted their claims there; or, if the lands had been patented to others, would have been in position to sue the new patentee. At least by the delay they saved the possible expense of a long litigation which might have resulted at the end in finding that the patents under which the legal title, which they sought to have conveyed, was held had been in the meantime canceled by the Government.

It is respectfully submitted, therefore, that the contention that the doctrine of laches is applicable to this case is without merit.

II.

Statute of Limitations.

Counsel for appellees incorrectly stated our position as to the statute of limitations. We do not contend that statutes of limitations are without application to any suits in equity in those jurisdictions where the equity and law jurisdiction is still separate. Our contention as to the application of the statute of limitations may be briefly stated as follows:

(*a.*) The statute of limitations first enacted in Great Britain applied to actions at law and had no reference to suits in equity. Subsequent to that enactment in England, the courts of equity, while denying that they were in any way bound or controlled by the statute of limitations, yet, for convenience, applied the doctrine of laches by analogy to the statute of limitations.

(*b.*) In the United States, in those States in which the distinction between law and equity has been abolished by the adoption of the civil codes, and the term "action" is used to embrace both actions at law and suits in equity, the statute of limitations is, by its terms, made applicable to both classes of actions, and is applied by the courts of such States, both in equitable and legal proceedings, in obedience to the terms of the statute. Such are the rules in Minnesota, California, and other States from which cases were cited by counsel for appellees.

(*c.*) In the States of the Union where the distinction between the equity jurisdiction and the law jurisdiction is still

maintained, the statute of limitations applying to actions at law is not held to embrace suits in equity unless made applicable thereto by its expressed terms.

In cases, however, in which the jurisdiction at law and equity is concurrent, the courts of equity apply the statute of limitations in the States, either in obedience to the statute or by analogy thereto, and thus prevent a party who has a right of action at law, and has permitted the same to be barred by the statute, securing relief upon the claim in the concurrent jurisdiction in equity.

In these States, however, where the equity jurisdiction is exclusive or the relief sought can only be obtained in equity, the statute of limitations is not applicable; but the courts of equity apply the doctrine of laches by analogy to the statute of limitations for convenience, unless there are peculiar facts and circumstances which would make it inequitable so to do.

Such is the rule in the State of Florida, in Virginia, New Jersey, and other States where the distinction between law and equity is still maintained.

(*d.*) In the United States court there are three rules:

(1.) Where the suit in equity in the United States court is one of which the law court would have concurrent jurisdiction, the law side of the court being bound by the statute of limitations of the State in which it arises, the equity side of the court will apply the same period of limitations, either in obedience or by analogy to the statute.

(2.) Where the suit is one of exclusive equity jurisdiction, and of which the State courts and the Federal courts have

concurrent jurisdiction—that is, which arises either under the common law or State statutes, and the Federal court has jurisdiction on the ground of diverse citizenship, for instance—the Federal court will adopt the rule of the State court of equity and applies the same period of the statute of limitations solely by analogy to the statute, unless there be some equitable consideration which would make it improper to apply the statutory period. Here the Federal court occupies substantially the same position as a State court of equity in those States where the distinction between the courts of equity and courts of law is still maintained.

(3.) In suits of a purely equitable character in the courts of the United States for relief upon purely Federal grounds or based upon acts of Congress the Federal courts are in no way affected by the statute of limitations of the several States. Their jurisdiction cannot be limited, restrained, or interfered with in such cases by State legislatures. They are bound solely by acts of Congress, the equity rules established by the courts, and, where these do not apply, by the rules of procedure and principles established by the High Court of Chancery of Great Britian. In such cases they may apply the analogy of the statute if they see fit, and often do so, as in the case of Elmendorf *vs.* Taylor, 10 Wheaton, 152, cited in the opening brief; but they are not bound by the statute nor bound to consider it, since they administer in such cases a jurisdiction entirely independent of State statutes, which is the same throughout the United States, irrespective of the varying periods of limitations fixed by the several States. The authorities illustrating these princi-

ples, which we have sought to summarize, will be found cited in our opening brief, pages 160 to 177. We do not, therefore, consider the further discussion of the principles as to the statute of limitations necessary.

Statute of Limitations of Florida.

In considering the statute of limitations of Florida we must follow the rule of construction applicable to all other statutes and look to the history of the law and the facts and circumstances surrounding both the enactment of the statute and the cases decided in the construction thereof, as well as the language of the statute itself.

An examination of the laws of Florida will disclose the fact that there was no statute of limitations in that State subsequent to the civil war until 1872, the stay laws having been in force from immediately after the civil war until that date (Hart *vs.* Bostwick, decided in 1872, 14 Fla., 162).

In 1870 the code of procedure was adopted in Florida, by which all distinction between actions at law and suits in equity was abolished and all proceedings for relief in the courts were termed "civil actions." This condition of the law continued until January 1, 1874, when the code of procedure was repealed and the original distinction between law and equity procedure was re-established, and has so continued down to the present time. When the statute of limitations of 1872 was enacted, however, the code of procedure was in force, and the term "action" as used in the statute of limitations was construed to embrace certain classes of suits in equity, because under the code then in force the

distinction between actions and suits had been abolished. This is the explanation of the decision of Branch *vs.* Cole in 18 Florida; Brown *vs.* Brown in 17 Florida; Jordan *vs.* Sayre, 24 Fla., 1, and Hope *vs.* Johnson, 28 Fla., 55, relied upon by appellees.

In the first of these cases the court explains that the suit there brought to set aside dower was a proceeding which, under the civil code in force at the time that the statute was enacted, would have been an action by complaint under the terms of that code, and therefore, construing the statute of 1872 in the light of the then existing state of the law, the term "action" as used in the statute must have been intended to apply to such a procedure. To the same effect is the decision of Brown *vs.* Brown. These cases were decided upon their peculiar facts and cannot properly be considered as authority for the contention of the appellees that the section relied upon applied to "any suit in equity."

In this connection it may be remarked that the quotation found on page 4 of the brief filed by Messrs. Gunby and Bisbee and page 2 of the brief of Mr. Bisbee, appearing to be from the decision in Brown *vs.* Brown, is not to be found in the report of that case.

Jordan *vs.* Sayre (*supra*), like Brown *vs.* Brown, arose when the statute of 1872 was in force, and the court applied the twenty-year limitation to a contract under seal in the foreclosure of a mortgage.

The same is true of Hope *vs.* Johnson (*supra*) except that the mortgage was a chattel mortgage not under seal, as to which the court applied the five years' limit barring a contract not under seal.

In 1891 the legislature of Florida adopted a complete re-

vision of its general laws, which became effective in 1892, and the present statute of limitations was a part of the revised statutes then enacted.

The present statute varies in many important particulars from the statute of 1872, but what is most important in the consideration of this case is the that the statute of 1892, now in force, was enacted after the repeal of the code of procedure and at a time when the distinction between law and equity jurisdiction had been completely restored in Florida.

It must be presumed that the draftsman of the present statute was an accurate lawyer, and the term "action" in those States where the equity and law jurisdictions are separate and distinct is never construed to embrace a suit in equity.

A mere examination of the statute itself, in the light of these facts, shows that it was not intended to apply and does not apply to a suit in equity, and, so far as we know, it has never been construed by the courts of Florida as embracing such suits.

To the contrary, as we have already shown, in States like Florida, where the distinction between law and equity is maintained, the statute of limitations upon actions at law is never construed to apply to suits in equity unless it be made applicable by the expressed terms of the statute, and is only applied by analogy upon the principles which we have already stated at length.

It is respectfully submitted, therefore, that, in the light of these considerations and the history and terms of the statute itself, it cannot be successfully maintained that the term "action" as used in the statute in question has any application to suits in equity, or that the provision of the statute

fixing a limitation of four years upon actions not therein expressly provided for can have been intended to fix a limitation of four years upon suits in equity of every character and description. If the legislature of Florida intended anything of that kind, justice to the public and for other considerations demanded that it should have expressed the intention in the clearest terms.

In the specifications of demurrer as filed in the circuit court on behalf of appellees there was only one section of the statute of limitations of Florida on which the appellees then relied. They have, however, attempted to specify in argument and not by specifications of demurrer another clause in a different section of the statute of limitations of Florida which, we contend, has not been properly raised for consideration by this court on the record as presented.

But, even if properly presented, their contention that the suit is subject to the provision of the statute fixing three years as a period of limitation upon actions founded upon fraud is untenable, and it would seem that the provision of the statute is itself a complete answer.

In the first place, this is not a suit founded upon fraud, either legal or actual, and it has been so held by this court in the case of Lee *vs.* Johnson, 116 United States, 48.

The jurisdiction of this court in cases of this character is based upon two grounds:

(1.) That the patentee has been guilty of such fraud as prevented the complainant from properly presenting his case to the Department or prevented the Department from properly considering his case when presented. These are the only conditions under which the claimant to land can invoke the jurisdiction of this court on the ground of fraud.

(2.) Where the jurisdiction of the court is invoked upon the ground that there has been an error in the construction of the law by the Interior Department, and in such case the constructive trusts (so called) sought to be raised is based entirely upon the claim of mistake in the construction of the law.

This case belongs to the second class. There is no allegation of any fraud which interfered with the presentation of the case to the Department or its consideration by the Department; but the sole ground upon which the jurisdiction of this court is invoked and the relief is asked is that the Interior Department had made an error or mistake in the construction of the law, and that but for this error or mistake the patent would have been issued to the complainants. This is not, therefore, an action for relief either upon the ground of legal or actual fraud.

It is suggested by counsel that unless this provision of the statute be held to apply to suits in equity it would nullify the provision, since relief on the ground of fraud is always sought in equity. This contention is manifestly unsound. There are numerous actions at law on the ground of fraud. An action for deceit is based upon this ground. A person induced to pay money by fraudulent representation may bring an action at law for its recovery upon the ground of fraud, and it has been held by the courts of Florida that an action of replevin for recovery of personal property obtained by fraud may be maintained in law (Hammond *vs.* Lynes, 21st Florida, 118). But why go further? Before this court in the case of Crawford *et al. vs.* John E. Burke, in the opinion delivered by Mr. Justice Brown on November 7, was

an action for damages on the ground of fraud in the conversion of personal property.

Looking also to the language of the section providing a limitation of three years, we find that the provision as to actions founded upon fraud is classed with actions of trespass and similar actions, and in the construction of this section the doctrine of *ejusdem generis* should be applied. It would be a most remarkable state of affairs if the legislature of Florida injected a limitation upon suits in equity in a section along with actions of trespass and other actions at law of a similar class.

Counsel for appellees call attention to the fact that there is no disability clause in favor of infants in the statute applicable to the four-year clause or the three year clause, and we submit that this is an additional reason for the construction given by us to the effect that both of said clauses are inapplicable to suits of the particular character involved herein, but relate rather to personal actions at law which could be instituted by administrators.

It is a rule for construction of statutes of this character that they must be taken as a whole. In this case, in article 2 of the statute, the legislature has provided a limitation of seven years for real actions, and actions of that class may be brought by heirs-at-law of a deceased person, as distinguished from the personal representative. In this section provision is made for the suspension of a statute during the period of disability by heirs-at-law on account of infancy, and it was obviously the intention of the legislature to provide for the protection of infants in all cases where they were the proper parties to institute the proceedings—that is, in all cases pertaining to real estate or involving the title

thereto. The case at bar involves a proceeding which could only be brought by the legal representatives of Hackley who are his heirs-at-law, and it is not only in accordance with the letter but the spirit of the law as well that, if the statute of limitations of Florida is to be considered at all in this case, that period should be applied which the legislature has fixed as applicable to actions at law involving the title to real estate.

In the light of these principles, it is respectfully submitted that the statute of limitations of Florida was not intended to embrace and does not embrace suits in equity; that this case being one of purely equitable jurisdiction, based upon an act of Congress, this court will disregard the statute of Florida in considering the question of laches in connection herewith; that if it considers the statute at all, it will follow the case of Elmendorf *vs.* Taylor, 10th Wheaton, and numerous other cases to the same effect and apply no shorter period than that fixed by the State statute as a limitation upon actions of ejectment, to which this proceeding is most analogous.

We will now notice briefly some of the authorities relied upon by counsel for the appellees. In the light of the principle stated, it will readily be seen that they have no application to this case, but are, without exception, decisions arising in States where a code of procedure is in force, the distinction between law and equity is abolished, or the statute of limitations by its terms includes proceedings in equity, or are cases in which there was concurrent jurisdiction in law and in equity.

These cases have been referred to more in detail in our original brief, with the one exception of Bank *vs.* Daniel, 12

Peters, 56, and the attention of the court is referred to our original brief, pages 174 to 177, inclusive, for more particular reference thereto.

In the case of Bank *vs.* Daniel, 12 Peters, 56, no federal question was involved. The courts of equity and law had concurrent jurisdiction, as expressly stated in the opinion.

In Baker *vs.* Cummings, 169 U. S., 189, there was no federal question involved. This was a suit for accounting, founded upon fraud in fact, of which law and equity had concurrent jurisdiction, and the statute of limitations as to a suit at law was applied direct.

In Norris *vs.* Haggin, 136 U. S., 386, there was no federal question involved. It arose in California, where the code of procedure was in force abolishing distinction between law and equity. The action was based upon fraud in fact, and the same was dismissed upon the ground of laches of fifteen years after discovery of the fraud. Special attention is called to a quotation from the decision of the court in this case, commencing at the bottom of page 174 of our original brief.

In St. Paul R. R. Co. *vs.* Sage, 49 Federal Rep., 315, the controversy arose under a State statute of Minnesota, where there is no distinction between law and equity. No federal question was involved. Besides this, the construction of the State statute was admittedly at variance with that given by the supreme court of the State in a prior decision.

Teal *vs.* Schroder, 158 U. S., 172, was a suit arising in California, in which the code of procedure is in force. The claim asserted did not arise under a federal statute, and fraud in fact was charged.

In Cleveland Insurance Company *vs.* Reid, 24 How., 284,

no federal question was involved and the State statute of limitations expressly provided for suits in equity.

It will thus be seen that the statute of limitations of Florida does not apply to suits in equity, and that, even if it did, it would not serve to bar a suit of the character involved herein. There is in this case a federal question; the suit is based exclusively upon the construction of statutes of the United States providing for the disposition of lands of the United States, and the court would only apply the statute of limitations of Florida, if at all, by analogy to suits at law for the recovery of real property, which is seven years.

III.

As to Vested Rights under the Act of April 22, 1826.

It is earnestly insisted by counsel that Hackley and his legal representatives could acquire no vested right under the act of 1826 until he had complied with all the conditions subsequent contained in the second section of the act of 1813, and had paid the purchase-money for the land.

Realizing that the authorities applicable to the early preemption acts, without exception, support our contention, and that not one authority can be found construing any preemption act prior to 1841 which is in conflict with our position, counsel earnestly insist that the act of 1826 was similar in principle, and practically the same in terms, as the act of 1841, and thus attempt to apply the authorities construing the act of 1841 in the construction of the act of 1826. In reply to this position, we ask the court to re-read our opening brief, pages 15 to 59, where this subject is fully discussed.

The terms of these acts themselves constitute a full answer to the contention of counsel. As pointed out in our opening brief, the act of 1826 is an immediate grant, as of the date of the passage of the act, of the right or interest thereby conferred in consideration of past settlement and cultivation.

The grant is made upon the same terms, conditions, etc., as are prescribed by the act of 1813. By turning to the first section of that act (see page 2 of opening brief) it will be found that the grant is made of the right to purchase upon the same terms as are provided by law for the sale of other lands sold at private sale in the territory in which the land may lie. The second section of this act prescribes conditions subsequent which must be complied with in order to *perfect the right of interest granted into a legal title.* It does not say that these things shall be done before the right or interest granted by the first section shall accrue, but requires that the person claiming the same shall, in order to perfect it into a legal title, give notice, etc., and provides that for failure to perform these conditions subsequent the right granted shall be forfeited. Why provide for a forfeiture if nothing had been granted? Why not provide that the claimant should *acquire* no right until these things had been done, if it were intended that they should be conditions precedent? The fact that the second section provides for a forfeiture for failure to give notice is conclusive evidence that an interest has been granted by the first section which can thus be forfeited. As was stated by the court in *Lytle vs. Arkansas,* when the settlement was thus "sanctioned by law" by the passage of the act, it became a legal right, subject only to be forfeited for failure to perform the conditions annexed to it—that is, conditions subsequent.

This construction of the acts of 1826 and 1813 is fully borne out by the historical development of the land system, the purpose and intent of these acts, the objects which they sought to accomplish, and the contemporaneous authorities construing the same, which have been reviewed in our opening brief, to which the attention of the court is earnestly asked.

In our opening brief, pages 21 to 28, we have pointed out the conditions which led to the passage of the act of 1841, and the difference between that act in terms and in principle to the act of 1826.

In their argument, counsel insist that the act of 1841 applied to past settlements, and therefore was similar in principle to the act of 1826 and other early pre-emption acts. This act did provide for all settlements made between the first day of June, 1840, and the date of the act, and, as to such settlements, gave rights similar to those conferred by the early pre-emption acts, *but not one authority construing the act of* 1841, *relied upon by counsel, deals with any settlement made between* 1840 *and the date of the passage of the act of* 1841.

The act of 1841 did what no earlier act had done, in that it provided for *future settlements.* In order that the future settler should acquire any right under the act, however, he was required—

(1.) To make settlement in person on public lands to which the Indian title had, at the time of such settlement, been extinguished;

(2.) Which public lands had been surveyed prior thereto;

(3.) He should inhabit and improve the same;

(4.) He should erect a dwelling thereon;

and then he should have the right of pre-emption "*upon paying* to the United States the minimum price of such land; subject, however, to the following limitations and exceptions."

Under this act, by its terms, all of the above steps had to be taken, including the payment of the money, before any right whatever was acquired.

A mere examination of the terms of this act shows that all the above provisions of the act are precedent to the acquisition by the settler of any right whatsoever, as distinguished from the early acts, which gave in terms the right or interest for the past consideration as of the date of the act, and then in another section provided for a forfeiture of this interest for failure to comply with certain simple conditions subsequent. This distinction is so clear that we are utterly unable to comprehend upon what principle or authority counsel contend for the contrary.

Counsel have cited, in their briefs and argument, a number of authorities which they claim support their position that the act of 1826 gave no right or interest in the land to the settler who came within its terms until he had complied with the conditions subsequent named in the second section of the act of 1813. We trust we can render the court some assistance by a brief review of the principal authorities so cited, and we think we can certainly show that they do not support any such contention.

Haile vs. Gaines, 22 Howard, 144:

This was one of the numerous cases growing out of the Hot Springs reservation, Arkansas. Haile claimed under a

pre-emption settlement, while Gaines claimed under a location of New Madrid scrip. The act giving the right to holders of New Madrid scrip to locate upon the public lands limited the same to lands "the sale of which was authorized by law." At the time that the alleged location was made the land in question had not been surveyed and was not open to entry. The court held that the location was invalid, as the sale of the land was not, at the time it was made, "authorized by law." It expressly refused to pass upon the pre-emption claim asserted in that case, since it had been denied by the court below. This case has no application to the case at bar, for the reason that New Madrid scrip could not be located until the lands were open for sale. It is not contended that the lands in Florida were open for entry or sale at the time Hackley made the settlement, but the act of 1826 granted to settlers upon the unsurveyed public lands the right of pre-emption, irrespective of whether the lands were at the time of settlement open for sale or not. The *act of Congress* must govern rights of parties in each case.

Rector vs. Ashley, 6 Wall., 142:

This was another case growing out of the Hot Springs reservation. It was another attempt to set up a title under New Madrid scrip, the location of the same having been made before there was any survey or before the land was open for sale. The court held that no vested interest in the land or any portion of it as against the United States was effected until after the survey was made and returned in the office of the recorder of land taxes, for the reason that until this was done the land was not open for public sale, *which was a condition*

contained in the act of 1815 providing for New Madrid scrip locations. What we have said with respect to the case of *Haile vs. Gaines, supra,* applies here. No such limitation was contained in the act of 1826, under which the complainants claim. Indeed, that act confirmed in terms the rights of every settler who had actually cultivated land in Florida, whether the same was at the time of settlement open for sale or not, and the rights of the complainants are governed and controlled by that act.

Frisbee vs. Whitney, 9 Wall., 187:

This was one of the numerous cases growing out of the Vellejo grant, and the pre-emption claim under consideration arose under the *act of* 1841. Frisbee was the original settler upon the tract of land in question, having acquired title under the Vellejo grant. That having been declared invalid in 1862, Whitney made a forcible entry upon the land occupied by Frisbee and erected improvements thereon and claimed the right of pre-emption. This occupation was resisted by Frisbee without success. In 1863 Congress passed an act for the relief of the settlers under the Vellejo grant, giving them the right to pre-empt their settlements under the act of 1841. Whitney claimed that, he having made his settlement prior to the passage of this act of 1863 for the benefit of Frisbee and others, Congress could not defeat the right acquired by such settlement under the act of 1841. The equities were all with Frisbee, as was stated by the court in its opinion, he being the original settler. The court below held that Whitney acquired a vested right by virtue of his settlement, which could not be defeated by the subsequent act of Congress. This decis-

ion was reversed by the Supreme Court in an opinion by Mr. Justice Miller, basing the reversal upon the terms of the act of September 4, 1841 (see p. 194). It was upon this state of facts (to which we invite the careful attention of the court, since great reliance is placed upon this case) that the Supreme Court held that under the act of 1841 the preemption claimant acquired no right, *as against the United States*, until he had complied with the provisions of the act and paid the money, and rendered its decision in favor of Frisbee, the original settler.

While the court held that the act of 1841 gave no vested right, *as against the United States*, until the conditions precedent had been performed, which was clear on the face of the act itself, it also held, in this case, that occupation and improvement does confer a *preference over others* in the purchase of such lands by a *bona fide* settler, which will enable him to protect his position against other individuals, and which the land officers are bound to respect.

While this case involved the construction of the act of 1841, and therefore cannot be used as authority against our position upon the act of 1826—entirely different in principle and in terms—yet the decision of the court that, even under the act of 1841, the first settler acquired rights which the courts would protect, is direct authority in support of our position.

Hutchings vs. Low, 15 Wall., 77 (Yosemite Valley case):

This case involves substantially the same principles as *Frisbee vs. Whitney*. On June 30, 1864, Congress granted the Yosemite valley to the State of California, in trust for-

ever, as a public park. Six weeks previous to the passage of this act Hutchings had entered the tract of land so granted, and made a settlement. He subsequently claimed, as against the State and the act of Congress aforesaid, the right of pre-emption under the act of 1841, by virtue of his settlement, made six weeks prior to the passage of the act. In support of this claim he urged that the act of 1841 gave to settlers a vested right, by virtue of their settlement, which Congress could not defeat by subsequent legislation.

The terms of the act of 1841 prescribing the conditions precedent were a sufficient answer to this contention, but it is obvious, from an examination of these opinions and the arguments thereon, that up to the time that cases arose under the act of 1841 settlement and occupation were regarded as giving a vested right of pre-emption under the former acts of 1826, 1830, and others which have been referred to; and it took several decisions to point out clearly the change which had been made in the law by the act of 1841, referring to future settlers.

The court held (see p. 87) that mere occupation and improvement, under the act of 1841, could give no right to the land occupied, as against the United States, nor impair the right of Congress to dispose of the same. The court italicized the words "as against the United States," thus showing that this principle was limited to claims against the Government, while settlement and occupation (as held in *Frisbee vs. Whitney*) would give priority of right which the courts would protect as against future settlers.

It is in this case that Mr. Justice Field reviews at length the case of *Lytle vs. Arkansas*, and points out that the decisions of *Frisbee vs. Whitney* and *Hutchings vs. Low*, upon

the act of 1841, are not in conflict with the case of *Lytle vs. Arkansas*, with which statement we are in full accord. He says, at page 92, "There is nothing in the case of the defendant which is at all analogous to that of Cloyes."

In both *Frisbee vs. Whitney* and *Hutchings vs. Low* the court refers in general terms to earlier cases, in which there were peculiar equitable considerations and difference in conditions and facts, which led the court to different conclusions, but which, in the decisions then being made, being upon entirely different statutes and different facts, the court did not deem it necessary to review.

Emphasizing the distinction between a claim against the United States and a claim between individuals, the court, at page 93, says:

> "The whole difficulty in the argument of the defendant's counsel arises from his confounding the distinction made in all cases, whenever necessary for their decision, between the acquisition by the settler of a *legal right to the land* occupied by him, as against the owner, the United States, and the acquisition by him of a *legal right as against other parties to be preferred in its purchase*, when the United States have determined to sell."

It will thus be seen that in both *Frisbee vs. Whitney* and *Hutchings vs. Low* the court only decides that mere settlement and cultivation, under the act of 1841, could give no vested right as against the United States; but it also decides that, even under the act of 1841, where conditions precedent were prescribed, and had to be complied with in order to acquire a right as against the United States, yet mere settlement and cultivation would give a right as *against other claimants*, which the courts were bound to respect, and

which would be protected whenever the land was offered for sale by the United States. If that be true of an act referring to future settlers, where the right is given only upon the performance of conditions precedent, how much stronger is the position of claimants under an act giving an immediate grant to past settlers for a past consideration, subject only to forfeiture for failure to perform conditions subsequent.

Shepley vs. Cowan, 91 U. S., 330 :

This was another case which arose under the act of 1841, and therefore cannot be authority against our position on the act of 1826, yet there is much that is instructive in this decision.

Here the court again held that, "whilst according to previous decisions of this court, no vested right in public lands *as against the United States* is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or acquisition of the land when the United States have determined to sell or donate the property. In all such cases the first in time in the commencement of the proceedings for the acquisition of the title, when the same are regularly followed up, are deemed to be the first in right" (Opinion, p. 338).

It was further held, under the act of 1841, that lands were not open for settlement until they were surveyed; but it must be remembered that the act of 1841, by express terms, limited its operations to surveyed lands, while earlier preemption acts contain no such limitation, and of necessity

applied to settlements on unsurveyed lands; otherwise they would have been inoperative. (See opening brief, pp. 70, 78.)

Rector vs. The United States, 92 U.S., 698 (Hot Springs cases):

In these cases there were three claims to be disposed of. The first was that of John C. Hale (Opinion, p. 702), which was a claim under the act of April 12, 1814, based upon an alleged settlement by one John Percifull, in 1809. At page 703 of the opinion the court holds that at the time of this alleged settlement no right could be acquired, because the Indian title to the land had not been extinguished, and that therefore the land was in reservation as Indian territory. It further holds, at page 705, that, aside from the legal obstacles, "it is not clear from the evidence that Percifull came within the description of the act of 1814. He resorted to the hot springs temporarily during the visiting season, to deal in such articles as persons there for their health needed. When they left, he left. If he erected shanties or cabins, it was not for the purpose of permanent residence, but for temporary accommodation. His actual residence was several miles distant. There is no clear evidence of an intent on his part at that time, or previously, to make this retired spot in the Indian Territory his home."

It will thus be seen that this claim was disposed of upon its peculiar facts, and did not necessitate a construction of the rights acquired by settlers who came within the terms of the act of 1814, and no construction of this act is given.

The Gaines claim was made under the act of 1830, which expired in 1831. In 1832, before any proof of this claim had been made, the lands were reserved by act of Congress.

Subsequently the act of 1830 was revived in 1834, but before it was revived the lands had been reserved. The court held, therefore, that at the time the lands were reserved for sale by act of Congress there was no existing claim on the part of Gaines, and no act in existence under which it could be initiated.

The third claim was that of Rector, who claimed under New Madrid scrip, which, as we have seen, was limited in its location to lands open for sale at the time the location was made; and the court held, in terms, that this land was not land "the sale of which was authorized by law" at the time of this alleged location.

All of these claims were disposed of upon their peculiar facts. They involved no construction of the statutes bearing upon this case, and are not authority either for or against our position.

Hall vs. Russell, 101 U. S., 503:

This case is relied upon by counsel in support of their positions (1) that the act of 1826 was not a grant *in præsenti;* (2) that no vested rights could be acquired by settlement and cultivation. The case does not support their contentions.

This was a case arising under the Oregon donation act of September 7, 1850. That act gave to every white settler or occupant of public lands, etc., "who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act," the rights therein provided. Obviously, this four years' residence and compliance with the provisions of the act were conditions precedent to the vesting of any right. The act also related to future settlements, and there could be no

grant *in præsenti* to persons making settlements in the future, because the persons referred to in the act did not then exist.

Commenting upon this language, the court at page 510 says:

> "The grant was not to a settler only, but to a settler who had completed the four years of residence, etc., and had otherwise conformed to the act. Whenever a settler qualified himself to become a grantee, he took the grant, and his right to a transfer of the legal title from the United States became vested."

The claimant in the case of *Hall vs. Russell* had not complied with these conditions, and therefore acquired no vested right.

This distinction is clearly shown by the case of *Johnson vs. United States*, 2 Court of Claims Reports, 391, reviewed in our opening brief (pp. 52, 53). In the Johnson case the settler had completed his four years' residence and cultivation; but his claim rested, as was stated by the court, "entirely upon his four years' continued residence and cultivation and previous notification." The court held that this gave him a vested right to the land, even as against the United States, and based its decision upon decisions under early preemption acts upon which we now rely, and particularly upon the case of *United States vs. Fitzgerald*, 15 Peters, 418, construing one of these acts.

Clearly, the case of *Hall vs. Russell* can have no bearing upon the case at bar, for the statute is entirely different in terms, and the facts of the case are also different. In this case Hackley had completed the settlement and cultivation required, just as in the Johnson case. Here the grant was to persons in existence in consideration of past settlement

and cultivation, which had been completed. Here all the conditions for a grant *in præsenti* existed, and the first section of the act of 1826, and also the first section of the act of 1813, clearly make such a grant to the parties coming within the terms of the description used in the acts.

The case of *Johnson vs. United States*, arising under the Oregon donation act, is a strong authority in support of our position, because there the right rested upon settlement and cultivation which had been completed, as in this case, and the court held that such completed settlement and cultivation gave a vested right, even against the United States.

Buxton vs. Travers, 130 U. S., 232:

This was a case which arose under the act of 1841. It is unnecessary to go into an elaborate review of the case. As we have already seen, under that act no right was acquired as against *the United States* until all the conditions precedent were performed. The act of 1826 contained no such requirement. In *Buxton vs. Travers* the conditions required by the act had not been performed.

This case is also cited as authority for the contention of counsel that, Hackley not being able to complete his right into a legal title before his death, nothing descended to his heirs. We have noticed this contention in our opening brief (pp. 110–123), to which the court is referred. A complete answer is found in the fact that the grant is made in terms to the settler or his *legal representatives*. But counsel, entirely disregarding the terms of the act, have sought to read into it provisions of the act of 1841, and to construe it by authorities applicable to that act, which can have no bearing upon the language of the act of 1826. Section 2269

of the Revised Statutes has absolutely no connection with this case.

This review of the authorities, cited and relied upon by counsel, shows clearly that these authorities are not opposed to our contention; but, to the contrary, in so far as they are applicable at all, the case of *Frisbee vs. Whitney* and other similar cases support our position, for they hold, in terms, that while under the act of 1841 no vested right was acquired against the United States until the conditions were performed and the money paid, yet, even under that act, as against *other claimants* to the land, mere settlement and cultivation gave to the first settler a right which the courts would protect when the land was disposed of.

On the other hand, our contention that the act of 1826 gave to the settler coming within its terms an immediate grant of an equitable interest in the land or a vested right to purchase the same upon the liberal terms prescribed therein for a past and executed consideration is not only sound in principle, but is supported by every authority which we have been able to find construing the early pre-emption acts.

These settlers went upon the public lands, though they were not for sale, made no claim thereto until Congress should act, but relied upon the universal custom then existing on the part of Congress to protect such settlers by enactments before the lands were thrown open for public sales. Congress did pass this act, giving to every settler upon the public lands in Florida the right of pre-emption in the purchase of the same as of the date of the passage of the act, and this grant was not a mere gift, but, as shown by the records of the Government from the earliest times, was

made in consideration of the benefits resulting to the public and to the property of the United States from the settlements thus made in the face of hardship and danger. The settlement and cultivation was a part payment for the land, and though the settler had no right to demand anything until Congress acted, yet when Congress did act and accepted this settlement and cultivation as part payment it vested in the settler a contingent equitable interest in the land as completely as if that part consideration had been paid in money or in any other valuable asset.

We have said that this position is sustained by every authority construing these early pre-emption acts. The principal authorities have been collected in our opening brief (pp. 38–59), to which the attention of the court is invited.

Thus the Secretary of the Treasury, in 1819, in construing the act of 1813, under which we claim (2 P. L. I. & O., 298), holds that locations of New Madrid scrip, under the act of 1815, will not be allowed where the right of pre-emption, under the act of 1813, *may have been or shall afterwards be proved.* In the same communication he holds that where lands have been sold at private sale, and under instructions from the Land Office, such sales shall be "considered as null and void, and the money refunded to the purchaser" if the right of pre-emption be proved to the land.

The Attorney General of the United States, in an opinion (2 P. L. I. & O., 61), holds that the act of 1830 gave an *unqualified right of entry* to persons who had possession as required by the act, and that it was *unlimited as to time,* except as to lands offered for sale under proclamation of the Presi-

dent, in which case it was limited to the beginning of sales. (See our opening brief, p. 44.)

As we have seen, the act of 1830 was limited to one year from the date of its passage. Any person was entitled to the land upon which he had settled who proved his right of pre-emption within one year. The Commissioner, in dealing with the difficulty growing out of private sales made within this year when the right of pre-emption might afterwards be proved, refers to the right of pre-emption as given by the act of 1830 as a "*vested right to a pre-emption*," although no proof had been made, and then says: "I would observe that many cases exist where lands have been sold at private sale, to which the right of pre-emption has since been proved, and will be sustained under the law." This decision could not have been rendered upon any other view than that the settler was given a vested right of pre-emption as of the date of the passage of the act, and it is, therefore, held that even if the land be sold before this right is *proved*, the settler's right will prevail, if proved by the time limited by the act.

We have seen that the supreme court of Arkansas, in the case of *Wynn vs. Morris*, 16 Ark., 414, held that the act of 1830 gave a vested right of pre-emption as of the date of the passage of the act, which right it protected, though the proof was not made until 1844. This opinion is quoted in our opening brief (pp. 46–50), to which the attention of the court is invited.

In the case of *Brown's Lessee vs. Clements*, 3 How., 666, the Supreme Court of the United States holds that the act of 1830 "*appropriated*" *to the claim of the settler* the quarter section upon which he had settled for one year (the act being

limited to one year), and that such appropriation could only be defeated by failure to comply with the conditions subsequent named in the act.

In *United States vs. Fitzgerald*, 15 Peters, 418–420, it was contended that the land claimed by Fitzgerald under an act of June 19, 1834, was reserved by the United States. The court says:

> "The reservation and appropriation mentioned in the act of 29th of May, 1830, must have been valid and subsisting *at the date of the act of 19th of June*, 1834, to deprive defendants of their right of pre-emption." (Italics ours.)

This is, in effect, to say that the right vested as of the 19th of June, 1834, the date of the passage of the act under consideration, and that any reservation to defeat that right must have been existing as of the date of the passage of the act, and not as of the date of proof of payment which was made to the 19th of June, 1834.

In *Lytle vs. Arkansas*, 9 How., 314, it is decided that the pre-emption claimant acquired a vested right by virtue of settlement and cultivation as of the date of the passage of the act.

Counsel have undertaken to explain away this decision, and have referred to the review thereof in *Hutchings vs. Low*, *supra*. In this latter case Mr. Justice Field was explaining that there was nothing in the case of *Lytle vs. Arkansas* to militate against his position in *Hutchings vs. Low* and *Frisbee vs. Whitney*, construing the act of 1841, and this is very clearly shown. That is all that the review of *Lytle vs. Arkansas* in that case amounts to.

The report shows that, in *Lytle vs. Arkansas*, Cloyes made

proof of his claim in May, 1831. The lands were not surveyed until December, 1833, and Cloyes then tendered the purchase-money. It is in this connection that the court, speaking of the pre-emption claim, says:

> "The claim of pre-emption is not that shadowy right which by some it is construed to be. Until sanctioned by law it has no existence, and is a substantive right. But when covered by law it becomes a legal right, subject to be defeated only by failure to perform the conditions annexed to it."

This expression, "sanctioned by law," can only mean that when the act granting the pre-emption was passed, for if the court meant that it was "sanctioned by law" only when the conditions had been performed, then its subsequent language, saying that it could be defeated for failure to perform those conditions, is unintelligible. This is further shown as the meaning of the language of the court by reference to *Brown's Lessee vs. Clements*, 3 How., 666, above referred to, where the court used the expression that the act of 1830 was an appropriation of the land upon which the settler had made a settlement to his claim. It is further shown by the language of the opinion (p. 334), where it is said:

> "Before the grant was made by Congress of this tract, the right of Cloyes to a pre-emption had *not only accrued* under the provisions of the act of 1830, but he had *proved his right under the law* to the satisfaction of the register and receiver of the land office."

This is, in effect, saying that the right accrued or vested as of the date of the passage of the act, and in this particular not only had the right accrued, but, in addition to that, Cloyes had *proved his claim*—that is, had performed

some of the conditions subsequent. If proof were necessary before the vesting of the act, this language would be meaningless.

It is submitted that no one can read this whole opinion without reaching the conclusion that the court there decided, in terms, that the pre-emption claim was "sanctioned by law" and vested as a legal right as of the date of the passage of the act.

If there were doubt upon this subject, it would be removed by the language of the same court in *Bernard vs. Ashley*, 18 How., 43–45, where, in commenting upon the case of *Lytle vs. Arkansas*, the court said that the land was decreed to "Cloyes, the claimant, this court holding his claim to the land to have been a legal right *by virtue of the occupancy and cultivation*, subject to be defeated only by failure to perform the conditions of making proof and tendering the purchase-money." (Italics ours.)

Here we have a construction of the opinion by the court which delivered it, and they say, in terms, that the right vested upon the passage of the act *by virtue of mere settlement and cultivation*, and that the conditions of making proof and payment were conditions subsequent, a failure to perform which conditions might result in a forfeiture.

This position is fully supported by the constructions of these early decisions in the case of *Johnson vs. United States*, 2 Court of Claims Reports, 391, where they were applied to the Oregon Donation act, as above indicated, and the decision in this case was so clearly right that, although a large amount of money was involved which the United States had to pay, it was not appealed to the Supreme Court. In that case, as in the cases arising under the early pre-emption acts,

the right rested entirely upon settlement and cultivation and the terms of the act.

It is submitted, therefore, that taking the terms of the act of 1826 and 1813 in the light of the principles governing the vesting of rights and interests in property, the rules in respect to conditions precedent and conditions subsequent, and the contemporaneous construction of these acts in the executive and judicial departments in all cases arising prior to the act of 1841, it is conclusively established—if anything can be established by principle and authority—that the act of 1826 was a grant *in præsenti* of a vested right or an equitable interest for a valuable past and executed consideration, and that this right or interest could only be defeated by forfeiture for failure to perform conditions subsequent annexed to it.

By the review of the authorities cited by counsel for the appellees it is seen that they have not produced one single authority in opposition to this view, and after an examination of the records and decisions upon land laws, from the earliest time down to the present, we have been unable to find a single authority that upon a careful examination in any way militates against our position. Nothing save long lapse of time and the introduction of new principles by modern legislation and modern decisions, construing recent legislation, could have caused any confusion upon this subject. We ask that these be brushed aside, and that the rights of the claimants be tested by the act under which they claim and the principles and authorities applicable thereto.

But we go further and say that, while the decisions relied upon by counsel, such as *Frisbee vs. Whitney*, *Hutchings vs. Low*, and *Shepley vs. Cowan*, establish that under the act of 1841 no vested right could be acquired *against the Government* until the performance of the conditions prescribed therein, yet, as between the Hackley heirs and subsequent claimants, where the Government has no interest, these cases are strong authority in favor of the claim of the Hackley heirs, founded upon prior settlement and cultivation; for they hold in terms that the prior settler acquired rights, even under the act of 1841, *by virtue of settlement and cultivation*, which the courts would protect against claims founded upon later settlements.

IV.

The Act of March 31, 1807.

Mr. Hampton, in his brief, has devoted much space to the argument that the act of 1807 nullified the act of 1826, with respect to the Hackley claim.

The fact that the Secretaries of the Interior reached this conclusion is, in our judgment, conclusive evidence of the very superficial investigation given to the case by the Department, and of the illogical character of their opinions.

We have carefully examined this contention in our opening brief, pages 60 to 69, to which we refer the court. It is sufficient to say here that, as we have shown, we think, conclusively, and as will more fully appear by reference to the debates upon this act printed in our opening brief, pages 183 to 205, it was the consistent policy of Congress, before opening such lands to sale, to pass acts confirming the rights

of settlers ahead of surveys. By the act of 1826 Congress, with the act of 1807 before it, declared that *every settler* upon the public lands of Florida should be entitled to the rights granted by that act, and the declaration of Congress to that effect is conclusive upon the courts, nor can the courts read other limitations or restrictions into the act. Whether the act of 1807 was in effect or not, the act of 1826 removed any disabilities which might have resulted therefrom with respect to settlers upon the public lands in the Territory of Florida.

V.

Did the Act of 1826 Apply to Settlements upon Unsurveyed Lands?

We have already discussed this question in our opening brief, pages 70 to 80, and have shown that this act and other early pre-emption acts applied peculiarly to settlements made ahead of surveys; otherwise they were practically of no effect. It was to protect such settlements that these acts were passed. This fact is recognized in all contemporaneous authorities, many of which are cited in our brief.

For instance, in the case of *Lytle vs. Arkansas proof of settlement* was allowed to be made two years before the surveys of the land in question had been made, and the court in that case (page 332 of the opinion) refers to the general instructions of the Land Office allowing proof to be made, identifying the land as well as the circumstances will permit, before surveys are made, and the court there holds that, proof having been made before survey, it is not necessary to make another proof describing the lands by quarter-section lines after the surveys have been made.

The act of 1813 refers to lines *run or to be run*, and the records of the Government are full of instructions similar to those referred to in the opinion in *Lytle vs. Arkansas*, allowing proof to be made where the surveys were delayed. Some of these are cited in our opening brief. We do not feel that a further discussion of this subject can be necessary or profitable. We will only add to what was said in our opening brief the following statement from the opinion of Mr. Justice Field in *Morrow vs. Whitney*, 95 U. S., 551, 554:

> "From the earliest period in the history of the country, claims to tracts of land upon which persons have settled and made improvements in advance of public surveys and before the lands have been offered for sale, sometimes upon the express invitation of the public authorities and sometimes upon their supposed acquiescence, have been presented for the equitable consideration of the Government."

We have already shown that Congress met these claims based upon settlements made ahead of surveys by special enactments, such as that under which complainants claim.

VI.

The Effect of the Occupation of the Tract in Question by Troops of the United States from 1824 to 1830, and the Subsequent Reservation.

Our contention that the act of 1826 gave to settlers in the Territory of Florida who came within its terms a vested right of pre-emption or equitable interest in the land as of the date of the passage of the act having been established, the only remaining question of consequence in this case, ac-

cording to our judgment, is the effect of the occupation of this tract of land by the detachment of troops from 1824 to 1830.

We have discussed this question fully, and cited authorities in support of our position, in our opening brief (pp. 81–118), to which we ask the special attention of the court.

In that discussion we think we have conclusively shown that such occupation did not constitute a claim to the land on the part of any other person, which was the only exception contained in the act of 1826. Indeed, this contention is so absolutely untenable that, although it was the basis of the decision of the court below, counsel have practically disregarded it in their argument.

We will now notice, briefly, their contention that such occupation constituted a reservation or appropriation of this tract of land, so as to take it from the operation of the general act of Congress.

In our opening brief (pp. 85–91) we set out fully the actual facts with respect to this occupation.

By reference to the record (p. 6) it will be found that the bill alleges that in the year 1824 "a detachment of United States troops sent to the southern portion of the Territory of Florida, under the command of Col. George M. Brooke, in connection with certain Indian troubles then existing, located a camp or cantonment upon said tract of land, which was then inhabited and cultivated by said Hackley," etc. It is further alleged that the land was reserved for the first time in 1830.

Secretary Smith in his opinion (p. 53) makes the following finding of facts as to Hackley's settlement and the occupation by troops:

"It appears that R. J. Hackley entered upon the land claimed by his heirs, included in said reservation, in 1823, and that said Hackley never relinquished his claim to said land, and that he made settlement in good faith, so far as the record discloses, and for the purpose of securing a home, which claim his heirs contend was superior to any made subsequent to the abandonment of such reservation.

"It further appears that in March, 1824, in obedience to the *instructions from the War Department*, that portion of said reservation now in controversy was *occupied by United States troops in cantonment*, and was so used until December, 1830, when it was *formally reserved by executive order*, in which its limits were fixed at sixteen miles square. Subsequent to this, said lands were in a state of reservation the greater portion of the time, until January 4, 1883, when they were relinquished and finally restored to the public domain." (Italics ours.)

This is the finding of fact in the opinion, which counsel contend is the only one which has any bearing upon this case. It is true that in the subsequent argument of the case the Secretary states that the tract of land was occupied under the direction of the Secretary of War, but this is stated by way of argument, while the finding of facts above quoted precedes the argument, and is the basis thereof.

The opinion is loosely written in many respects, and it is evident that in using the expression "occupied under direction of the Secretary of War" the Interior Department is basing its statement upon a supposed presumption that the action of the War Department is the action of the Secretary of War. To take any other view is to attribute to the Secretary a finding that is absolutely opposed to the entire record and the actual facts of this case, for the record shows that the land was actually occupied under an order issued by an aide-de-camp connected with

the office of the Commanding General of the Army, and that said order related only to the movement of troops and on its face was not intended to affect the status of this or any other tract of land. This may, in a general sense, be said to be the direction of the Secretary of War, for all orders emanating from any officer of the War Department within the scope of his authority is a direction of the Secretary of War. The finding of facts, however, which we have quoted above is the real finding of the Secretary in this case, and is to be taken as the facts of the case, so far as his finding goes, rather than the argumentative statement subsequently made.

It will further be noticed that the Secretary finds that this land was occupied by "troops in cantonment" and not as a reservation. A cantonment is a temporary camp for a detachment of troops in winter quarters or for other temporary occupation. This is the universal and accepted definition. It is but another name for camp.

The occupation was "in cantonment," not in reservation, nor is there any evidence of an *intention* to create any reservation or change the status of this land until 1830.

Now, what was the effect of such an occupation? If it be presumed that the direction of the War Department was constructively the direction of the Secretary of War, yet that does not constitute a reservation of public lands in any sense or change their legal status. The Constitution gives to Congress exclusive power to dispose of public lands. The courts have held that the President has the power by proclamation, in conformity with proper regulations, to make specific reservation of public lands for executive purposes, and have held, also, that where the order making such reservation is issued by the *head of an executive*

department it is presumed to be the order of the President and is effective; but we challenge the production of a case which holds that even were an order issued by a subordinate officer of the War Department for the purpose of creating a reservation such order would be effective to accomplish that result. The order must be actually or constructively the order of the President. To say that an order of the War Department, as distinguished from the Secretary acting for the President, is the order of the President would be to presume, first, that the order of the subordinate officer was the order of the Secretary of War, and then, upon that presumption, to presume that this constructive order of the Secretary of War was the order of the President, which would be basing a presumption upon a presumption, which is never allowed.

The authorities are absolutely opposed to any such position. In the case of *Wilcox vs. Jackson*, which is the only case which counsel cite in support of their contention, the court says that the order of the Secretary of War is presumed to be the order of the President; and, further, that when a tract of land is legally appropriated for any purpose—that is, set aside in accord with the provisions of the law and segregated from the public domain—it is not subject to a general act of Congress.

In *Wolsey vs. Chapman*, 101 U. S., 755, 769, the meaning of this language is considered. There the court says:

> "The truth is, there can be no reservation of public lands from sale, except by reason of some treaty, law or authorized act of the executive department of the Government, and the acts of *heads of departments* within the scope of their powers are in law the acts of the President." (Italics ours.)

In *United States vs. Tichnor*, 12 Fed. Rep., 415, and *Johnson vs. United States*, 2 Ct. of Claims, 391 (discussed in our opening brief, pp. 103 to 107), an effort was made by the commanding general to reserve the lands from public sale, with description of the land, and all the formalities observed, and yet the courts held that such action was not the action of the President, and that these orders were not effective to in any way change the legal status of the land. As was said in *United States vs. Tichnor:*

> "But such use or occupation would not have the effect to impart any special character to the land, or constitute it a reservation for any purpose within the purview of the donation act."

This statement is in accord with the unbroken line of decisions upon this subject, so far as we can find. It is suggested that because Colonel Brooke was sent to southern Florida with a detachment of troops to locate a site for a military cantonment, which, as shown by the allegations of the bill and the record, was to aid Colonel Gadsden in running the line in accordance with the Indian treaty, that this designation of Colonel Brooke and Colonel Gadsden to locate a site for the camp gave to their action some peculiar quality or force. It is submitted that there is nothing in this contention. If the Secretary of War or the War Department had directed Colonel Brooke to locate a contonment or fort or reservation in southern Florida, this in itself would not have made the location selected a reservation until it was approved by the President or the head of a department acting in his stead, for the Constitution has limited the power to dispose of public lands; and, as we have seen, it can only be done by Congress or by the President

acting personally or constructively. Colonel Brooke could have *selected* a site or a reservation and *reported his selection* to the War Department. Then if the Secretary had issued an order approving the selection and reserving the tract of land so selected, it would then, for the first time, have affected the legal status of the land. This is what was done in 1830, and up to that time the lands were as completely public lands as on the day they were transferred from Spain to the United States.

Wolsey vs. Chapman, 101 U. S., 755.

Morrow vs. Whitney, 95 U. S., 551.

Neither Colonel Brooke nor Colonel Gadsden were directed to locate any reservation, nor could this authority have been delegated to them. They were directed to locate a camp with respect to a certain object, and the permanent headquarters of the troops occupying this camp were declared to be at Cantonment Clinch. The Secretary of the Interior found nothing more as a fact in this case than that this tract of land was *occupied* by troops *in cantonment* from 1824 to 1830, and, as we have seen, the authorities hold that such occupation does not and cannot affect the legal status of the land. There is absolutely no record of any occupation or reservation or of anything else affecting the status of this tract of land in the Land Department until 1830, and we challenge the production of a case in which the legal status of land has been affected from the earliest history of this country to the present time when a record thereof has not been made in the Land Department, which has control of the public lands, or a case where their status has been affected otherwise than by act of Congress, a

treaty of the United States, or an order or proclamation of the President or one of the heads of departments acting in his name and by his authority, with intent to create a reservation and describing the land reserved by metes and bounds. Not one of the elements necessary to the making of a reservation existed in this case until 1830, even if such a power could have been delegated to a subordinate military officer, which we deny upon the most elementary principles of law and of agency. In *Morrow vs. Whitney*, 95 U. S., 551, the statute excepted lands "occupied" by the military. The distinction between "occupation" and reservation is there clearly shown. The first does not affect the status of land, and is shown by parol proof. The second affects the legal status, and is shown by record.

If this camp or cantonment had been abandoned in 1828 or 1829 or at any other time before the formal reservation in 1830, no question could have arisen as to the disposition of this tract of land. It would have been disposed of as Cantonment Clinch and as hundreds of other cantonments in the Territory of Florida were disposed of, which tracts were occupied by troops for a greater or less time, as the interests of the military service required, and when this occupation ended they were disposed of as all other public lands, their status never having been affected in the slightest.

It is submitted, therefore, that both reason and authority conclusively support the proposition that when the act of 1826 was passed, although Hackley could not *occupy* this land, for the reason that it was then in temporary occupation of troops, yet the legal status of the land, as public land, was the same as all other lands in Florida, and that the right of pre-emption in the purchase thereof, or a

contingent equitable interest therein in consideration of his settlement and cultivation, passed to Hackley and his legal representatives, by the terms of the act, as completely as if they had been named in the act itself. The only effect of this occupation was to deprive him of the right of possession so long as such occupation was necessary for the purposes of the United States, just as the United States can take possession temporarily of the lands of any citizen for its military purposes. The subsequent reservation in 1830 could not, as was held in *United States vs. Fitzgerald*, and is, as we understand, admitted, affect the right of Hackley (which had already accrued upon the passage of the act) further than to suspend the perfection of that right into a legal title until the land became subject to disposition and the reservation by the United States had terminated.

Against this position no sound reason can be advanced; not one authority has been produced. In support of our contention the language of the act itself can be cited; the reason of the law can be relied on, and an unbroken line of authorities has been produced as to the effect of occupation and the requirements as to reservation, and we ask that the rights of the complainants be adjudged accordingly.

We understood Mr. Bisbee to contend that the reservation of the land in 1830 destroyed Hackley's rights. The answer is that no reservation after Hackley's rights had accrued could affect those rights further than to delay the acquisition of the legal title and possession. The right remained unimpaired, subject to the superior right of occupation by the United States (Lytle *vs.* Arkansas, 9 How., 314; U. S. *vs.* Fitzgerald, 15 Peters, 418).

As to the contention that the act of 1856 defeats this claim,

we need only say that the act provided that abandoned military reservations should be disposed of as other public lands. When, therefore, these lands were restored to the public domain they came back in the exact condition they were when reserved, and with all rights attached. When the land was relinquished in 1883, it was restored to the status it occupied in 1830, except that notice of Hackley's claim was then on file and remained only to be perfected into legal title by payment of the purchase price which was tendered in 1887. It was restored subject to the act of 1826, as well as other acts of Congress.

VII.

The Contention that Hackley and His Legal Representatives Have Not Complied with the Condition Subsequent Named in the Second Section of the Act of 1813.

This question has been fully discussed in section 2 of part I of our opening brief (pp. 124–146), and, in view of the fact that we had but little opportunity in the oral argument to discuss this branch of the case, we ask especial consideration of the court to the argument in our brief, which we think is conclusive upon this point.

In this connection, however, we refer the court to the allegation of the bill (Record, p. 10), which is as follows:

> "Your complainants allege that they and their decedent, the said Robert J. Hackley, did make full compliance with all the requirements of the laws of the United States with respect to their right of preemption and purchase of said land; but that, disregarding the rights of your complainants," etc.

This allegation is admitted on demurrer, and would seem to be conclusive of this point.

In addition to this admission, however, by demurrer, it may be noted that Hackley did, in fact, comply with every provision of the law. That law required that he should give notice of his claim two weeks before the beginning of the public sales in the district in which the land might lie.

It was suggested by Mr. Gunby, in argument, that the sales had begun in the land district of Eastern Florida before notice was given by Hackley of his claim. A sufficient answer to this statement is that there is not one word in the record to support it, and it is opposed to the allegation above quoted, which is admitted by the demurrers. In addition to this fact, it need hardly be argued that the language of the act did not refer to the beginning of sales in the land district, but in the locality in which the land claimed was situated. To apply to the beginning of sales in the entire district, covering nearly the whole State, would be practically to defeat the purposes of the act, because such sales were begun when only a very small part of the land had been surveyed, and long before there was any necessity for giving notice, in order to protect purchasers at public or private sale from pre-emption claims, which was the sole purpose of this provision.

In addition to this fact, it is alleged in the bill (p. 8) that in 1835, as soon as communication could be had with the Land Office, Hackley gave notice of his claim to the register and receiver, and "claimed the right of pre-emption in the purchase" of this tract of land. In 1843, when no public sales had been made in this section, and the tract in question had not been surveyed, being then in reserva-

tion, Hackley again served notice that he claimed the right of pre-emption in the tract of land known as Cantonment Brooke, Bay of Tampa, under the act of 1826.

Now, as we have seen, the Department, by its instructions during this era, permitted proof of the claim to be made before surveys, describing the land as far as might be done, especially where there was danger of loss of evidence or for other reasons it was desirable that the claim should be proved. See communication by the Commissioner to the register and receiver at Palmyra, Missouri, September 21, 1824 (opening brief, page 132), where instructions are given that where there is apprehension of loss of testimony by death or otherwise, and applications are made to enter pre-emptions previous to surveying the lands, they will permit *the right of entry* to be established, and the *payment* and *entry* could be made *after the surveys were returned.*

See also *Lytle vs. Arkansas, supra*, where proof was made two years ahead of surveys, and the court held that it was not necessary to make such proof again after survey. Other authorities might be cited to the same effect, but these are sufficient; and under these instructions and regulations the notice given by Hackley in 1835, and again in 1843, was a full compliance with this requirement of the act. As stated in the instructions aforesaid, the money for the land could not be tendered until it was surveyed, because the amount had not been ascertained; but the proof was made and notice given to the world, in the record of the Land Office, that this land was claimed by Hackley and his legal representatives, whenever it was open for sale.

In 1883 the land was restored to the public domain, and a plat of this tract was filed for the first time; but it was not

offered for public sale, and no notice was given of public sales, as required by law. Ten days after the plat was filed it was suspended, and remained in suspension until 1894. In 1884 all entries made in 1883 were canceled by the Interior Department, and remained canceled until the final decision of Secretary Smith. In 1887, while the plat was still suspended, and the running of all limitations stopped thereby, Hackley filed a formal declaratory statement, making claim to the right of pre-emption of purchase of this land, and tendered the entire purchase price to the register and receiver, which was refused because the land was in reservation, under their construction of the law, by virtue of the suspension of the plat. (See Record, pp. 25 and 26.) Here was a third and strict compliance with every requirement and provision of the law.

But we insist that this question cannot be raised in this court. Not only is the allegation of the bill conclusive on demurrer, but by reference to the record it will be found that the claims to this land were, in 1889, referred to the register and receiver at Gainesville, Fla., to hear all parties, take proof, and report the various claims upon their merits. This was done. So far as the record discloses, no question was raised as to the compliance by Hackley with the conditions subsequent named in the act of 1813. The Commissioner of the General Land Office (Record, p. 34) says :

> "So far as the record is concerned, all these parties are on an equal footing, and as Hackley's rights antedated those of all other settlers, they are paramount before this office."

This decision was reviewed by two Secretaries of the Interior, elaborately discussed, and, so far as the record shows, no question was raised as to Hackley's compliance with the conditions subsequent named in the act; and very properly, because they would have been promptly met in the Interior Department by the statement that the Department, in the exercise of its powers, had referred this case to ascertain the rights of all claimants upon the merits, and, as stated by the Secretary of the Interior and by the Commissioner, as above quoted, they all stood on an equal footing on this question.

Not having raised this question in the Interior Department, where, if there was any defect, it could have been remedied, so long as the plat was suspended, the appellees cannot now raise it in this court. The effect of the decisions of the Department was to find that Hackley did comply with all the conditions of the act, and they only decided against him on propositions of law as to the initiation of the claim, upon which propositions we have undertaken to show that the Department was clearly in error.

Beginning, therefore, with the allegation of the bill, which is conclusive, and taking next the facts as disclosed by the record, which show a complete compliance with every provision of this law, and add to this fact that this question was not raised in the numerous hearings before the Department, and that these cases were referred by the Department to the register and receiver to take evidence upon the merits, all the cases stand on an equal footing as to these technical provisions; and we insist that, so far as this demurrer is concerned, it is conclusively established that Hackley and his representatives did comply with the provisions of this act, and in any event the question cannot now be raised.

Conclusion.

We have thus undertaken to notice the argument of counsel and the authorities cited with respect to some of the more important points involved in this case. If the case were considered alone upon the act of 1826, and upon the allegations of the bill and the facts as admitted by the demurrer, and upon the contemporaneous authorities construing the act of 1826, as it should be, there would be but little difficulty in its decision. It has been complicated by bringing in numerous irrelevant points, by the indiscriminate citation of authorities which have no application, and the difficulty arises out of eliminating this irrelevant matter. The case briefly stated is simply this:

Hackley made his settlement in 1823 and 1824. In 1826, four years before the land was reserved or its legal status changed in any way, Congress, which had exclusive jurisdiction in the premises, granted to every person and the legal representative of any person who had actually inhabited and cultivated a tract of land in the Territory of Florida (which description exactly covered the complainants), which tract was not rightfully claimed by any other person, the right of pre-emption in the purchase thereof, in consideration of the benefits resulting to the public, and the increase in the value of public property by virtue of such settlement and cultivation—an immediate grant for a past and executed consideration. It provided that such settler should perfect this right or interest into a legal title by giving notice of his claim and paying $1.25 per acre at any time before the beginning of public sales, of

which sales, under the law as it always stood, several months' notice was given by proclamation.

Hackley was deprived of the *occupation* of the tract of land in question by troops of the United States engaged in military service, but possession was not required by the act, and the legal status of the land was not affected until 1830, when it was included in a reservation for the first time. This reservation was made before Hackley could make proof of his claim under the conditions as they then existed, but his right had vested or accrued in 1826, and he did give notice and make proof, as required by the statute, in 1835, and again in 1843. With these notices among the records of the Land Office, the land was restored to the public domain in 1883. Ten days afterwards the plat was suspended and no more entries allowed, and entries already made were canceled in 1884. In 1887 Hackley again gave notice of his claim and tendered the entire purchase-money before public sales commenced, for they have never been made, nor has proclamation of any such sale ever been made. Upon these facts it is earnestly contended that there can be no reasonable question but that Hackley and his legal representatives come within the express terms of the act of 1826, and are entitled under the law to the land in question upon payment of the Government price, which right the court should protect. Whether we look to the authorities construing the early pre-emption acts or the act of 1841, this claim is superior to that resting upon any subsequent settler. The question as to whether it would be good against the United States is not raised, for the United States is no longer interested in the controversy.

This position is made stronger by the equitable consid-

erations growing out of surrounding facts and circumstances—considerations which have ever been invoked by the executive departments and the courts in support of the claims of these early settlers, who have been public benefactors in opening up the country to settlement and cultivation.

Especially is this true when his position and that of his legal representatives is contrasted with that of the patentee of this land. The purpose of the act of 1826 and of all these early pre-emption acts was to protect the claims and homes of pioneer settlers from speculators who followed in their steps and undertook to profit by their labors; yet if the decision of the Interior Department and the court below is allowed to prevail, the rights of the legal representatives of Hackley will be defeated by a claim notoriously speculative in its character and in its purpose—belonging to a class which every resource of the Government has been used to prevent and defeat.

Respectfully submitted.

WILLIAM H. LAMAR,
GEORGE H. LAMAR,
FRANCIS P. FLEMING,
FRANCIS P. FLEMING, JR.,
BEVERLEY B. MUNFORD,
EPPA HUNTON, JR.,
E. RANDOLPH WILLIAMS,
HENRY W. ANDERSON,
Solicitors for the Appellants.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 52.

SALLIE FIELD SCOTT, ELIZA MADISON SCOTT, HARRIET B. JONES, ET ALS., APPELLANTS,

vs.

LIZZIE W. CAREW, W. W. HAMPTON, E. R. GUNBY, ET ALS., APPELLEES.

BRIEF OF COUNSEL FOR APPELLEES.

WM. WADE HAMPTON,
Of Counsel for Appellees.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 13448

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 52.

SALLIE FIELD SCOTT, ELIZA MADISON SCOTT, HARRIET B. JONES, FREEMAN JONES, LUCIA BEVERLY BERNARD, HUGH S. MORRISON, HACKLEY MORRISON, ELIZABETH MADISON MORRISON, MARIA HACKLEY, MARY HACKLEY, SALLIE HACKLEY, MARY F. HACKLEY, SALLIE STRACHAN HACKLEY, ALEXANDER S. HACKLEY, GERTRUDE HACKLEY, THOMAS H. HACKLEY, and STEPHEN P. HACKLEY, *Appellants*,

vs.

LIZZIE W. CAREW, W. W. HAMPTON, E. R. GUNBY, M. G. GIBBONS, M. M. NELSON, E. C. BEACH, S. Y. FINLEY, and GEORGE W. HALL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF WM. WADE HAMPTON, OF COUNSEL FOR APPELLEES.

STATEMENT OF THE CASE.

On March 3, 1807, Congress passed an act prohibiting settlements upon the public lands. Section 1 provides:

"That if any person or persons shall, after the passage of this act, take possession of or make a settlement on any lands

ceded or secured to the United States by any treaty made with a foreign nation, or by a cession from any State to the United States, which lands shall not have been previously sold, ceded or leased by the United States, or the claims to which lands by such person or persons shall not have been previously recognized and confirmed by the United States, or if any person or persons shall cause such lands to be thus occupied, taken possession of or settled, or shall survey or attempt to survey, or cause to be surveyed any such lands, or designate any boundaries thereof by marking trees or otherwise, until thereto duly authorized by law, such offender or offenders shall forfeit all his or their right, title and claim, if any he has or they have, of whatsoever nature or kind the same shall or may be to the lands aforesaid, etc."

"And it shall moreover be lawful for the President of the United States to direct the marshal, or officer acting as marshal, in the manner hereinafter directed; and also to take such other measures and employ such military force as he may judge necessary and proper to remove from lands ceded or secured to the United States by treaty or cession as aforesaid, any person or persons who shall hereafter take possession of the same, or make, or attempt to make a settlement thereon until thereunto authorized by law. And every right, title or claim forfeited under this act shall be taken and deemed to be vested in the United States without any other or further proceedings."

Section second has no application to this case.

On March 30, 1822, an act was passed by Congress, making the act of March 3, 1807, applicable to the Territory of Florida. The bill alleges that about the month of November, 1823, Robert J. Hackley made settlement upon, inhabited, and cultivated a certain tract of land situated on the east side of Hillsborough river, at its confluence with the eastern arm of Tampa bay in the Territory (now State) of Florida, etc., and that he remained there until dispossessed by the troops of the United States in the month of February, 1824, under command of Colonel George M. Brooke, and that Hackley continued to reside in Florida until his death, in 1845. Complainants attach Exhibits "A," "B," "C," "D,"

and "DD" to bill. That the said troops continued in the occupancy thereof until December 10, 1830, when the property was established as a military reservation by an executive order of the President of the United States.

On April 22, 1826, and while lands were occupied by the Government troops, Congress enacted:

"That every person, or the legal representative of any person, who being either the head of a family, or twenty-one years of age, did on or before the first day of January, in the year one thousand eight hundred and twenty-five, actually inhabit and cultivate a tract of land situated in the Territory of Florida, which tract is not rightfully claimed by any other person, and who shall not have removed from said territory, shall be entitled to the right of pre-emption in the purchase thereof, under the same terms, conditions, restrictions, provisions and regulations in every respect as are directed by the act entitled 'An act giving the right of pre-emption in the purchase of lands to certain settlers in the Illinois Territory,' passed February fifth, one thousand eight hundred and thirteen, provided that no person shall be entitled to the provisions of this section who claimed any tract of land in said territory by virtue of a confirmation of the commissioners, or by virtue of any act of Congress."

Section 2 of said act of February 5, 1813, reads as follows:

"That every person claiming a preference in becoming the purchaser of a tract of land in virtue of this act, shall make known his claim by delivering a notice in writing to the register of the land office for the district in which the land may lie, wherein he shall particularly designate the quarter section he claims, which notice the register shall file in his office on receiving twenty-five cents from the person delivering the same. And in every case where it shall appear to the satisfaction of the register and receiver of public moneys of the land office that any person who has delivered his notice of claim is entitled according to the provisions of this act to a preference in becoming the purchaser of a quarter section of land, such person so entitled shall have a right to enter the same with the register of the land office on producing his receipt from the receiver of public moneys for at least one-twentieth part of the purchase-money, as in the case

of other public lands sold at private sale; provided that all lands to be sold under this act shall be entered with the register at least two weeks before the time of the commencement of the public sales in the district wherein the land lies; and every person having the right of preference in becoming the purchaser of a tract of land, who shall fail to make his entry with the register within the time prescribed, his right shall be forfeited, and the land by him claimed shall be offered at public sale with the other public lands in the district to which it belongs."

The reservation was from time to time reduced until June 1, 1878, the same only embraced 148.11-100 acres, as described in the bill. On January 4, 1883, the "Reduced Fort Brooke military reservation" was relinquished and transferred by the Secretary of War to the Interior Department, in accordance with law. On March 3, 1823, Congress passed an act authorizing the President of the United States to establish a land office in each district of East and West Florida as soon as, in his opinion, there was a sufficient quantity of public lands surveyed in either district to authorize the opening of one or both of said land offices (3d Stat., 750). A land office was duly established in St. Augustine in 1828. In the year 1835 Robert J. Hackley filed in the United States land office at St. Augustine, Florida, certain affidavits, being "A," "B," "C," "D," and "DD," attached to complainants' bill.

On November 27, 1843, he mailed a letter or notice to the register of the land office at Newnansville, Florida, as follows:

TALLAHASSEE, FLA., *November* 27, 1843.

SIR: You will please take notice that I claim the right of pre-emption to the tract of land known as Cantonment Brooke, Bay of Tampa, under the pre-emption act approved April 22, 1826, and that I have filed proof of the same in the register's office at St. Augustine.

Very respectfully your obedient servant,

R. J. HACKLEY.

Register of the land office at Newnansville, Florida.

Robert J. Hackley died in 1845. The bill does not disclose when the administrator of the estate of Robert J. Hackley was appointed, but on September 26, 1887, T. H. Randolph, administrator of the estate of Hackley, filed some kind of notice in the United States district land office at Gainesville, and on October 14, 1887, filed an application to pre-empt the land involved under act of April 26, 1822, act February 5, 1813, and act July 5, 1884. This application was rejected.

On March 22, 1883, the diagram of the official survey of the "Reduced Fort Brooke military reservation" was received by and filed in the local land office at Gainesville, Florida, and Edmund S. Carew, the husband of Lizzie W. Carew, appeared in person and made homestead entry upon the said lands.

April 2, 1883, the Commissioner of the General Land Office telegraphed the register and receiver to allow no entries upon any of said lands.

On January 22, 1884, the Commissioner of the General Land Office held for cancellation the homestead entry 11637 of Edmund S. Carew. An appeal was taken to the Secretary of the Interior, and on March 16, 1884, he affirmed the decision of the Commissioner. On May 10, 1887, the acting Secretary of the Interior reopened the case on the application of Daniel Mather, under the act of July 5, 1884, and allowed Daniel Mather to make pre-emption entry. On May 17, 1889, the Secretary reconsidered the decision of May 10, 1887, and directed a hearing before the register and receiver to determine the rights of the various claimants to the land. Edmund S. Carew died in 1886. Lizzie W. Carew, widow of E. S. Carew, made proof of settlement, residence, and cultivation by her husband and on her own part. On December 10, 1887, the register and receiver rejected the claim of Lizzie W. Carew and found in favor of the Hackley heirs, but declined to allow the entry of the Hackley heirs for reasons set forth in the bill. An appeal was taken to the Commissioner

of the General Land Office, and on December 10, 1890, the Commissioner affirmed the decision of the register and receiver (Exhibit G to bill). An appeal was taken to the Secretary of the Interior, and on the 25th day of November, 1892, the Hon. John W. Noble, Secretary of the Interior, rendered his decision rejecting the claim of the Hackley heirs and those of all others (Exhibit "F" to bill). All claimants moved for review and reconsideration of the decision of November 25, 1892, and on July 24, 1894, Hon. Hoke Smith, then Secretary of the Interior, rendered his decision, wherein he allowed and reinstated the entry of Edmund S. Carew as to lots 9 and 10 of section 24, township 29 south of range 18 east (Exhibit "J" to bill).

On September 9, 1895, Lizzie W. Carew, as the widow and sole heir-at-law of Edmund S. Carew, made final proof and commuted homestead entry for said lot; the same was approved for patent on July 29, 1896, and patent duly issued July 30, 1896. Subsequently James W. Bilbie *et al.* applied to the Department of the Interior to institute a suit to set aside and annul the said patent, alleging fraud in the procurement thereof. On the 8th day of March, 1898, the Secretary of the Interior denied and dismissed the petition (Exhibit "K" to bill).

The complainants allege in their bill the following conveyances, to wit:

Lizzie W. Carew to W. W. Hampton, October 4, 1895; Lizzie W. Carew to J. H. and W. W. Williams, May 20, 1896; W. W. Hampton and wife and Lizzie W. Carew to George W. Hall, March 7, 1896; J. H. and W. W. Williams to W. W. Hampton, June 4, 1896; W. W. Hampton to J. H. and W. W. Williams, June 15, 1896; J. H. and W. W. Williams to M. M. Nelson, June 4, 1896; J. H. and W. W. Williams to E. C. Beach, June 27, 1896; J. H. and W. W. Williams to S. Y. Finley, June 27, 1896; J. H. and W. W. Williams to Gunby & Gibbons, April 4, 1897; J. H. and W. W. Williams to Lizzie W. Carew, March 5, 1900; and

that the said several conveyances were made without real, legal, or valuable consideration, were collusively made for the purpose of injuring and defeating the rights of complainants, and that the said defendants were fully advised and had full knowledge of the rights and interests of the complainants in the land; and pray that the court will construe and interpret the acts of Congress recited in the bill, so far as the same are applicable to the case; that the defendants may be decreed to hold the legal title in trust for the complainants; that the defendants be required, upon payment to them of the Government price of the land and such further and reasonable charges as the court may find to be just and right, to convey the said land to the complainants, for general relief, and for process.

The complainants afterwards filed an amendment to the bill of complaint praying that the defendants be decreed to render a statement of all sales and conveyances made by them, and that they be decreed to hold the same in trust for and to pay the same to the complainants on such terms and conditions as may be agreeable to equity. * * *

The defendants demurred to the complainants' bills; the demurrers were argued and submitted, and on the 7th of February, 1902, the Hon. James W. Locke, judge, sustained the demurrers of the defendants and dismissed complainants' bills (order, p. 77, Trans.).

On the 29th of November, 1901, complainants amended bill by alleging that the decision of the Secretary of the Interior awarding the right to enter the said land was based upon erroneous conclusions of law, and that said patent was issued illegally and in mistake of the law and in violation of the rights of complainants.

The court made a statement of his findings, which appears at pages 77 and 78, Transcript.

From this decree dismissing complainants' bills the complainants appealed to the circuit court of appeals, fifth circuit.

On March 24, 1903, the circuit court of appeals affirmed the decree of Judge Locke, the decision being unanimous. (See Trans., pp. 83 and 84.)

The appellants have appealed from the decision of the circuit court of appeals to this court, and have filed seven assignments of error, recited in the record on pages 85 and 86.

Argument and Citation of Authorities.

It is unnecessary in the consideration of this case to argue each assignment separately. In order to present the case properly it is necessary to argue the several grounds of demurrer that were filed and presented in the court below in the order in which they appear in the record.

The consideration of the questions raised by the several demurrers involves the interpretation and construction of the several acts of Congress recited in the complainants' original bill and the application thereof to the facts as developed before the Land Department of the Government. The appellants have cited several decisions of the Supreme Court of the United States prescribing certain rules of interpretation of statutes.

Sieman's Adm'r *vs.* Sellers, 123 U. S., 285.
Smith *vs.* Townsend, 148 U. S., 490.
140 U. S., 453, 475.

But the rules of interpretation as pointed out by those decisions cannot be invoked in the consideration of the acts of Congress applicable to this case. "The intent of the statute is the vital part and the essence of the law." *This is the intention embodied and expressed in the statute.* A legislative intention to be efficient as law must be set forth in a statute. It is therefore a written law. How the intention is to be ascertained is only answered by the principles and rules of exposition. If the *statute is plain, certain, and un-*

ambiguous, so that no doubt arises from its own terms as to its scope and meaning and bare reading suffices, *then interpretation is needless;* and where the intention of a statute has been ascertained by the application of the rules of interpretation they have served their purpose, for all such rules are intended to reach that intent.

The rules of construction with which the books abound apply only where the words used are of doubtful import; they are only so many lights to assist the courts in arriving with more accuracy at the true interpretation of the intention. This is true whether the statute be public or private, general or special, remedial or penal. These rules are a part of the law of the land equally with the statutes themselves, and not much less important. The function of such interpretation unrestrained by settled rules would introduce great uncertainty and would involve a power virtually legislative.

Sutherland on Stat. Cons., s. 234.

Courts are not at liberty to speculate upon the intention of the legislature where words are clear and to construe an act upon their own notions of what ought to have been enacted.

Sutherland on Stat. Cons., s. 235.

The statute is its own expositor. If the true sense can thus be discovered, there is no resort to construction. If the legislature has expressed its intention in the law itself with certainty, it is not admissible to depart from that intention on any extraneous consideration or theory of construction. Very strong expressions have been used by the courts to emphasize the principle that they are to derive their knowledge of the legislative intention from the words or language of the statute itself which the legislature has used to express it, if a knowledge of it can be so derived.

Sutherland on Stat. Cons., s. 236, and authorities there cited.

If the words of a statute are free from ambiguity and doubt and express plainly, clearly, and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation. The statute itself furnishes the best means of its own exposition; and if the sense in which words were intended to be used can be clearly ascertained from its parts and provisions, the intention thus enacted will prevail without resorting to other means of aiding in the construction. The legislature must be understood to mean what it has plainly expressed, and this excludes construction. The legislative intent being plainly expressed so that the act read by itself or in connection with other statutes pertaining to the same subject is clear, certain, and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms.

Sutherland on Stat. Const., s. 237.
United States *vs.* Fisher, 2d Cranch, 358.
United States *vs.* Hartwell, 6th Wallace, 395.
State *vs.* Buckman, 18th Fla., 267.
Denn *vs.* Reid, 10th Peters, 524.

Even when a court is convinced that the legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of language which is free from ambiguity. The courts have then no power to set it aside, or evade its operation by forced and unreasonable construction. Whether the law be expressed in general or limited terms, the legislature should be held to mean what they have plainly expressed, consequently no room is left for construction.

Sutherland on Stat. Cons., s. 237.
United States *vs.* Fisher, 2d Cranch, 358.

When the meaning of a statute is clear and its provisions are susceptible of one interpretation, that sense must be accepted as the law. For this purpose all parts of the statute are to be read and compared. It would be dangerous in the extreme to infer from extrinsic circumstances that the case for which the words of the instrument especially provided shall be exempt from its operation.

Sutherland on Stat. Cons., s. 238, and authorities there cited.

Again, all consistent statutes which can stand together, though enacted at different dates, relating to the same subject, and hence briefly called statutes *in pari materia*, are treated prospectively and construed together as though they constituted one act. This is true, whether the acts relating to the same subject were passed at different times, separated by long or short intervals at the same session or on the same date. They are all to be compared and harmonized if possible, and, if not susceptible of a construction which will make all their provisions harmonize, they are made to operate together so far as possible consistently with the evident intent of the latest enactment.

Sutherland on Stat. Cons., s. 283, and authorities there cited.

The statute must be construed with reference to the whole system of which it forms a part, and statutes upon cognate subjects may be referred to, though not strictly *in pari materia*.

Sutherland on Stat. Cons., s. 284.

These several acts of Congress are plain, clear, and unambiguous, and no extraneous facts are necessary in aid of construction. The mere interpretation by the court of the language of the several acts of Congress is all that is necessary to arrive at, and fully ascertain, the meaning and intent of

the law-making power. But should the court find any difficulty in the proper interpretation of the said acts, and should deem it necessary to consider extraneous facts in aid of construction, we contend that counsel for appellants in their brief have gone beyond the limits in citing what they term extraneous facts and circumstances.

Extraneous Facts in Aid of Construction.

Where the meaning of the statute or any statutory provision is not plain, the court is warranted in availing itself of all legitimate aids to ascertain the true intention, and among them are some extraneous facts.

In the 108 U. S., 254, the court says:

"Nor are we willing to accept the debates that are reported as occurring in Congress at the time of the passage of the deficiency appropriation act, of March 3, 1873, as evidence of the meaning of the clause on which the controversy in this case depends."

"The question is whether according to its correct construction that clause authorized the parties to execute the agreement into which they entered."

Again, in the case of The United States *vs.* The Union Pacific R. R. Co., 91st U. S., page 79, the Supreme Court uses this language:

"In construing an act of Congress we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for, or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts may, with propriety, in construing a statute, recur to the history of the times when it was passed, and this is frequently necessary, in order to ascertain the reason, as well as the meaning of particular provisions in it."

Aldridge *vs.* Williams, 3 Howard, 24.
Preston *vs.* Browder, 1 Wheat., 120.
Sutherland on Stat. Cons., p. 384.

It is clear, therefore, from the repeated declarations of this Supreme Court, that it is not admissible for the court to consider the debates in Congress at the time of the passage of the act of April 22, 1826, in order to interpret or construe that act, but that the language of the act itself must control.

Applying these principles of interpretation, I invite the consideration of the court to the first ground of defendants' demurrer:

"*That the alleged settlement and cultivation by Robert J. Hackley of the lands involved, in* 1823 *and* 1824, *did not confer upon, or vest in the said Robert J. Hackley, any right or lawful claim to any part of the land described in complainants' bills, because such entry upon, and possession of, said lands was without authority of law and in direct violation of the acts of Congress in force in the State of Florida at that time* (*act March* 3, 1807, 2*d Stat.*, 445; *act March* 30, 1822, 3*d Stat.*, 654)."

The acts above recited embodied the law in force in Florida at the time and date of the settlement of Hackley and his ejectment from the land by authority of the War Department of the Government.

Hon. Hoke Smith, Secretary of the Interior, in his decision, at page 4, says:

"At the time, the provisions of the act of March 3, 1807 (2d Stat., 445), were in force in the State of Florida, having been re-enacted in the act providing for the establishment of a territorial government in said State on March 30, 1822 (3d Stat., 654). The first section of the act of March 3, 1807, *supra*, provided:

"'That if any person or persons, shall, after the passage of this act, take possession of, or make a settlement on, any lands ceded or secured to the United States by any treaty made with a foreign nation, or by any cession from any State of the United States, which land shall not have been previously sold, ceded or leased, by the United States, or the claim to which lands, by such person or persons, shall not have been previously recognized and confirmed by the United States, or if any person or persons, shall cause such lands to be thus occupied, taken possession of or settled, or

shall survey, or attempt to survey, or cause to be surveyed any such lands, or designate any boundaries thereof, by marking trees or otherwise, until thereto duly authorized by law: such offender or offenders shall forfeit all his or their right, title and claim, if he hath, or they have, of whatsoever nature or kind the same shall or may be to the land aforesaid, which he or they shall have taken possession of or settled, or caused to be occupied, taken possession of or settled, or which he or they shall have surveyed, or attempted to survey, or caused to be surveyed, or the boundaries thereof he or they shall have designated, by marking trees or otherwise.'

"When R. J. Hackley was ejected from said land by the military in 1824 he could not, in view of the provisions of the act above quoted, have initiated any claim to said lands by virtue of his settlement."

Prior to this decision of Secretary Smith, to wit, on November 25, 1892, Hon. John W. Noble, Secretary of the Interior, in construing these statutes and applying the facts thereto, says:

"Besides, by the law in force at the date of Hackley's said settlement, persons were not allowed to settle upon any of the lands of the United States, except as tenants at will, under contract to be entered into with the local land officers. See act of Congress approved March 3, 1807 (Stat., 445), act of March 30, 1822, sec. 9 (3d Stat., 654). There can hardly be serious question, I think, that when the officers of the Government selected the site of said reservation, Hackley had no right thereto."

The authorities cited by Secretary Noble clearly sustain his decision and show conclusively that Hackley did not, and could not, acquire any vested rights by his unlawful entry upon unsurveyed Government lands.

Counsel for complainants have argued extensively and cited debates in Congress to show that the act of 1807 did not apply to the case of Hackley. But the language of the act of 1807 is too plain to admit of doubt. If the act of 1807

did not apply to *bona fide* settlers, why was it necessary for Congress to pass the remedial act of April 22, 1826?

"The *act of 1807 applied to all settlers.*"

1st. Because, in the act admitting Florida as a territory, the public land laws were extended only over *surveyed lands*, and any land legislation affecting Florida could therefore apply only to such surveyed lands.

2d. Because the act of 1807 made settlement on both surveyed and unsurveyed lands in Florida illegal, and before the settlement of Hackley was legalized, *if at all, by the act of 1826*, the land was formally appropriated by the President for public uses, and whatever rights he may have had were extinguished.

3d. That the act of 1807 *did* apply to all classes of settlements is proven by the fact that the President calls upon *all settlers* to sign a certain declaration, or take the consequences, which would be expulsion, regardless of the quality of their settlements. Certain claimants, viz., claimants under Georgia grants, *will have the law enforced against them*, but the others will not. Plainly, he regards them all as illegal, but in some cases, where *no right is claimed* by virtue of the settlement, the squatters will not be disturbed, in order that they may have the right to take advantage of future legislation of a more generous nature, should any be passed. In doing this he is simply exercising the discretion which the law seems to give him *of enforcing the law*, or not enforcing it, as he chose. The act was plainly passed for the purpose of preventing any person or persons from selling uncertain claims to innocent purchasers, pending future investigations by Congress, and in order to make it possible of enforcement *all* settlements were declared illegal. If this had not been done, the law would have been a dead letter. The law uses the words "right" and "claim" "of whatsoever nature or kind" and says "that if any person shall, after the passage of this act,

take possession of, or *make a settlement on* any lands, etc." Private land claimants were not required to make settlement, consequently this language could not refer to them, nor would their claims have been referred to as a "right," that word being technical in the Land Department and public land laws, as referring to a privilege or property accruing only under the *settlement laws*. Even settlements made *prior to the passage of the act are not legalized—such settlers only* remaining as *tenants at will* of the United States, with no promises held out to them, for at this time, as at the time of Hackley's settlement, there *was no law of the United States under which titles to lands, by purchase* or settlement, could be acquired in the State of Florida.

4th. Because even if the act of 1807 does not apply to Hackley's settlement such settlement was illegal and of no force or effect against the United States or any subsequent claimant, because there was at that time no law under which he could acquire title to the land, and before such a law was passed the land was segregated from the public domain by actual occupation by the Government for governmental purposes and by order of the Secretary of War. While the act of 1826 extends the privilege of the act of 1813 in all cases where settlement was made prior to January 1, 1825, except where the land was "rightfully claimed by any other person," and did not mention any other exceptions, it is simply folly to claim that lands set apart for public purposes were not so excepted. If Hackley had had a *settlement right* under some then existing law, even *that right* would have been forever extinguished when the land became a military reservation. This is a well-settled principle. But he had no such right, because no law existed under which he could get it. He was simply a trespasser, or, looking at it most favorably, a sort of tenant at will, and when the Government called upon him for the land in the manner contemplated by the second section of the act of 1807, he gave it up. Why? Because he

could not help himself. There was no law under which he could claim it, and he knew it. The best he could hope for was that Congress would some day pass a law which would fit his case. That law has never been passed. If Hackley's heirs are entitled to this land now, Hackley was entitled to it when the act of April 22, 1826, was signed by the President. Why did not his claim prevail then, and why has it not prevailed in all the years since? The answer is simple: The land was "rightfully" appropriated by the United States, and the act of 1826 did not apply thereto. If it had remained a military reservation, the right of the Government to keep it so, regardless of any claim that Hackley might make, certainly could not have been questioned. How, then, can his heirs dispute the right of the Government to dispose of its own property in its own way? Have they such an inchoate right as would prevent it? Under what law did they get it, and did it exist when the Government quietly took possession of its own land, free of all encumbrances or claims, for its own uses? In order to show how absurd the claim is, we might stretch the time of this reservation to 200 years and have the Hackley heirs still interposing to prevent the Government disposing of its property, because Hackley squatted on it once when there were no public-land laws.

In discussing the act of 1807 counsel seek to show that Hackley was a pioneer, and therefore entitled to special consideration, yet claim that, in this act, Congress conferred upon him rights and privileges in section 1 which were denied to pioneers who preceded him by section 2. They also assert that Hackley claimed *no legal right* by virtue of his settlement *until such right should be conferred by Congress*, yet they demand that this settlement be considered sufficient to prevent the Government disposing of this property to other persons. They entirely pass over the known and accepted segregating effect of a military reservation, because,

should they mention that, their entire argument would be baseless.

The act of 1807 not only makes illegal settlements of *any* character on *unsurveyed* lands, but *surveyed lands as well.* Even though the settlement would have been legalized by the act of April, 1826, the fact remains that when the land was formally taken possession of by the Government the settlement was illegal. What transpired after that in the way of legislation can cut no figure in this case, for on that day the land Hackley had settled upon ceased to exist as public land, and *was outside the pale of any legislation of a general nature, such as the act of* 1826. It is a known and accepted rule that lands set apart for public purposes cannot be disposed of *except by special legislation* or *legislation general to that class of lands only.*

Counsel for appellants, *while admitting that the possession and occupancy of the land in controversy by Hackley was not lawful,* contend that the act of Congress did not require lawful possession or occupancy, but simply "actual possession." Yet they argue very earnestly and strenuously that the act of 1807 did not apply to the settlement of Hackley, because the same was not intended to affect *bona fide* settlers, and invoke the construction placed upon the act of 1807 by the Secretary of the Treasury in 1808 in support of this contention. But the mere reading of the quotation from the language of the Secretary of the Treasury is sufficient to justify the conclusion that the interpretation put upon the language of that officer by counsel for appellants is entirely erroneous, and cannot control or influence the judgment of the court in the case at bar.

The Secretary of the Treasury, in the letters referred to, was only discussing the policy of the President as to the course to be pursued in dealing with the several classes of unlawful settlers, the act of 1807 leaving such matter entirely within the discretion of the President. The Secretary does not undertake to declare whether or not any *settlement*

could be lawful or *bona fide upon public lands* at that time. If it be true, as contended by counsel for appellants, that Hackley had no claim and asserted no claim to the lands by virtue of his alleged settlement and occupancy in 1823 and 1824, *then* he *could not predicate* or *initiate any pre-emption right* by *virtue of* such settlement.

A pre-emption claimant is defined to be "one who has settled upon land subject to pre-emption, with the intention to acquire title to it, and has complied, or is proceeding to comply, in good faith, with the requirements of the law to perfect his right to it."

Black's Law Dictionary, p. 925.
Hosmer *vs.* Wallace, 97 U. S., 575.

In above case this court held "that the occupation of the lands by the plaintiff was a mere intrusion upon the claim of another without any license of the Government;" and at page 581 uses this language:

"The term *bona fide*, as applied to the pre-emption claimant, does not change the qualifications of such claimant, nor the conditions upon which, under the general law, settlement with a view to pre-empt is permitted."

It is clear, therefore, that Hackley, not being a *bona fide* settler, but merely a casual occupant, not claiming any interest in, right or title to the property involved, his possession was, in contemplation of law, *mala fide*, and he acquired no rights, present or future, in the property.

Black's Law Dictionary, p. 914.

Nor was there any actual possession of the property as defined and contemplated by law, unless Hackley went upon the land, claiming some ownership and title to the property, and exercised acts of ownership over it.

Black's Law Dictionary, p. 914.

If he went upon the land and exercised acts of ownership, then he violated the laws of the United States, and was amenable to the penalties for such violation.

If Hackley did not acquire any vested rights under the acts of 1807 *and* 1822, *could he acquire any vested rights under the act of April* 22, 1826? *This question is raised by the second ground of demurrer. That—*

"*The act of April* 22, 1826, *giving the right of pre-emption to settlers upon lands in Florida, pursuant to the terms and provisions of the act of February* 5, 1813, *did not and could not have a retroactive effect upon the unlawful possession of the unsurveyed lands, described in complainants' bills by Robert J. Hackley, because the said acts referred to surveyed lands of the Government and were not intended to confer pre-emption rights in unsurveyed Government lands.*"

Secretary Noble, in his opinion denying Hackley's claim, says:

"Let us first inquire what rights Hackley acquired under said act of 1826. The first section of said act provided: 'That every person, or the legal representatives of any person, who being either the head of a family, or twenty-one years of age, did, on or before the first day of January, in the year one thousand, eight hundred and twenty-five, actually inhabit and cultivate a tract of land, situated in the Territory of Florida, which tract is not now rightfully claimed by any other person, and who shall not have removed from the said Territory, shall be entitled to the right of pre-emption in the purchase thereof under the same terms, restrictions, conditions, provisions and regulations in every respect, as are directed by the act entitled 'An act giving the right of pre-emption in the purchase of lands to certain settlers in the Illinois Territory,' passed February the fifth, one thousand eight hundred and thirteen (2 Stat., 797)."

By section 2 of said act of 1813, persons claiming a preference right of entry were required to file with the proper local land officers a notice particularly describing the quarter section which he claims, and any person entitled to a

preference right of purchase who shall fail to make entry of the land claimed by him at least two weeks before the commencement of the public sales shall forfeit his right, and the land claimed by him shall be offered at public sale with the other public lands in the district to which it belongs. His settlement was clearly illegal, and, by the express terms of said act of 1826, said reservation, being rightfully claimed as a reservation, was excepted from its provisions.

In the case of Frisbie *vs.* Whitney (9th Wallace, 187) the Supreme Court held that occupation and improvement on the public lands with a view of pre-emption confer no vested right in the lands so occupied; that such vested right is only obtained under the pre-emption laws, where the purchase-money has been paid and the receipt of the proper land officer given to the purchaser, and that until this is done Congress may legally withdraw the land from entry or sale, though this may defeat the imperfect right of the settler. In the opinion of the court, pp. 196, 197, it is said:

"The argument is urged with much zeal that because complainant did all that was in the power of anyone to do towards perfecting his claim, he should not be held responsible for what could not be done. To this we reply, as we did in the case of Rector *vs.* Ashley (6 Wallace, 142) that the rights of the claimant are to be measured by the acts of Congress, and not by what he may, or may not be able to do, and if a sound construction of these acts shows that he had acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient."

This ruling was reaffirmed by the Supreme Court in the Yosemite Valley case (15th Wallace, 77), and in Shepley *vs.* Cowen (91 U. S., 330, 337).

In the case of Atherton *vs.* Fowler (96 U. S., 513, 517) Mr. Justice Miller said:

"In the earliest stages of our land system no right or interest could be secured by the individual in any public land

until it had been surveyed into legal subdivisions. Nor after this had been done was it subject to sale until, by a proclamation of the President, it was brought into market ——, it often occurred that emigration, in advance of the readiness of the public lands for these sales, had caused hundreds and thousands to settle on them; and when they came to be sold at public auction, their value enhanced by the houses, fences, and other improvements of the settler, placed them beyond his reach and they fell into the hands of heartless speculators. To remedy this state of things, the pre-emption system was established. This at first was only applicable to lands which had been surveyed, but gradually this was changed, until, in 1862, pre-emptors were allowed on unsurveyed lands as well as those surveyed" (act of June 2, 1862, 12 Stat., 418).

The Government has never offered said reservation for sale. On the contrary, the War Department, legally acting, presumably by direction of the President, took possession of the said land and continued in possession thereof until it was relinquished to this Department for disposal under the laws then existing.

Secretary Smith, in interpreting the act of 1813, takes the same view that was held by Secretary Noble (Trans., pp. 44 to 57).

But counsel for appellants admit that Hackley acquired no rights under the act of 1807, and say:

"He could not 'forfeit' his claim, or title, because he made no claim, and acquired no title until his statement had been covered by law."

Lytle *vs.* Arkansas, 9 How., 314.

But they contend that the act of 1826 instantly created an estate *in presenti* in the settler, R. J. Hackley. Let us analyze the acts of April 22, 1826, and February 5, 1813:

1st. The act of 1826 requires actual inhabitance and cultivation on or before January 1, 1825.

2d. Right of pre-emption in the purchase of certain lands, under the same terms, restrictions, conditions, provisions, and regulations in every respect as are directed by the act of February 5, 1813.

3d. The land must not be rightfully claimed by any other person.

4th. The act of February 5, 1813, requires:

A. *Does not apply to lands reserved from sale by former acts.*

B. *Every person claiming preference in becoming the purchaser of a tract of land, etc., shall make known his claim by delivering a notice in writing to the register of the land office for the district in which the land may lie, wherein he shall particularly designate the quarter section he claims.*

C. The register shall file this notice on receiving twenty-five cents from the person delivering the same.

D. And in every case where it shall appear to the satisfaction of the register and receiver of public moneys of the land office that any person who has delivered his notice of claim is entitled, according to the provisions of this act, to a preference in becoming the purchaser of a quarter section of land, such person so entitled shall have a right to enter the same with the register of the land office on producing his receipt from the receiver of public moneys for at least one-twentieth part of the purchase-money, as in case of other public lands sold at private sale.

E. Provided that all lands to be sold under this act shall be entered with the register, at least two weeks before the time of the commencement of the public sales, in the district wherein the land lies.

F. And every person having a right of preference in becoming the purchaser of a tract of land who shall fail so to make his entry with the register within the time prescribed, his right shall be forfeited, and the land by him claimed

shall be offered at public sale with the other public lands in the district in which it belongs.

R. J. Hackley did not comply with either requirement of this act.

Applicants rely upon the case of Lytle *vs.* Arkansas, 9 How., 314.

In that case the facts were entirely different. The court says at page 335:

"Before the grant was made by Congress of this tract, the right of Cloyes to a pre-emption had not only occurred under the provisions of the act of 1830, but he had proved his right under the law, to the satisfaction of the register and receiver of the land office. He had in fact done everything he could do to perfect his right. No fault or negligence can be charged to him."

No such allegation in complainants' bill. The exhibits of complainants, on the contrary, which are made part of their bill, *show that Hackley never paid one cent to the Government; never tendered anything to the officers; that he did not file any petition, but some meager affidavits, that prove nothing.*

In the case of Hutchings *vs.* Low, 15 Wall., 77 (Yosemite Valley case), the court discusses the case of Lytle *vs.* Arkansas at length, and declares that the decision of the court and the doctrines expressed in the opinion are in entire harmony with the principles announced in Frisbie *vs.* Whitney, 9 Wall., 187. In the Hot Springs cases the interpretation of the act of February 5, 1813, was involved.

The court, in discussing the several acts which were involved in the case of Rector *et als. vs.* The United States, cited the opinion of Mr. Wirt, the Attorney General of the United States at that time, and says:

"Mr. Wirt, the then Attorney General, gave it as his opinion that no lands were authorized by law to be sold, which had not been publicly surveyed according to the general system of sections and townships. And as the region in which the Hot Springs were located, was subject to Indian

title until 1818, and had never been publicly surveyed, no lands could be located, etc."

This opinion of the Attorney General was followed by the General Land Office, and patents were refused for any lands thus attempted to be located. Hence the surveyor general did not recognize the survey of Conway and never returned it to the recorder.

And the court further says that the survey of 1820 was never returned to the recorder's office, and therefore the land never became located within the meaning of the act of 1815 or the act of 1822. It never became segregated from the public domain; it never became so appropriated to the claimants as to give them a vested right, etc. But the claimants insist that this was not the fault of Hammond and Rector, and that they did all that they could, and that the surveyor general should not be neglecting his duty, viz., that of recording the survey and returning it to the recorder of land titles, deprived them of their just rights; and the court decided in that case that no rights were vested in the claimants.

Rector *vs.* The United States, 92 U. S., 698.
Bagnell *vs.* Broderick, 13 Pet., 436.
Barry *vs.* Gamble, 5 How., 32.

Counsel for appellants further contend that the act of February 5, 1813, and the act of April 22, 1826, are different from all other laws, providing pre-emption rights enacted by the Congress of the United States, that inasmuch as they provide for pre-emption by parties who were in possession of the property, occupying and cultivating the same, prior to the passage of the act, that the same created an estate *in presenti*, the only conditions alleged being conditions subsequent and not conditions precedent. The fact is that there are conditions precedent prescribed by the said acts, viz., *the filing of the notice, the payment of the money to the register,*

the payment of the money to the receiver, the proof to the satisfaction of the register and receiver, all of which are essential before any right could have been acquired, even under these remedial statutes. This court has passed upon this question and has adjudicated and defined what constitutes an estate in presenti.

In the case of Hall *vs.* Russel, 101 U. S., 507, the court, in construing the "Oregon donation act" (9th Stat. at L., 496), says: "The opening words of section 4 are that there shall be and hereby is granted." This is appropriate language in which to express a present grant. It is well remarked by Mr. Justice Field for the court in Mo., Kan. & Tex. R. R. Co. *vs.* The Kan. Pac. R. R. Co. (97 U. S., 491): "It is always to be borne in mind, in construing a congressional grant, that the act by which it is made, is a law, as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee. If then, the law making the grant indicates a future grantee and not a present one, the grant will take effect in the future and not in presently. In all cases in which we have given these words the effect of an immediate and present transfer, it will be found that the law has designated a grantee qualified to take, according to the terms of the law, and actually in existence at the time (citing a number of authorities), and without particularizing further, it may be said generally, that in the swamp land cases, and of the internal-improvement-grant cases, where for the most part the question has arisen of late, if a grant has been held to take effect presently, the State, or some corporation having all the qualifications specified in the act, has been designated as grantee. In other words, when an immediate grant was intended an immediate grantee, having all the requisite qualifications, was named.

Coming, then, to the present case, we find that the grantee

designated was any qualified "settler or occupant of the public lands, and shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of the act. The *grant was not to a settler only*, but *to a settler who had completed* the *four years of residence, etc.*, and *had otherwise conformed* to the *act*. Whenever a settler qualified himself to become a grantee, he took the grant, and his right to the transfer of the legal title from the United States became vested, but until he was qualified to take there was no actual grant of the soil, etc."

Mr. Hackley never attempted to make an entry of these lands. He merely wrote a letter to the register (p. 88, Trans.). This was not an entry. He should have followed this up by paying the money required by the law to the receiver and should have presented the receiver's receipt to the register in accordance with the act of 1813. He could then have made demand upon the register to permit the entry. The demand without this was of no force or effect.

Counsel for appellants also overlook the fact that there is no allegation that the register and receiver were satisfied that Hackley was entitled, according to the provisions of the acts, to a preference in becoming a purchaser of the land. The exhibits do not disclose such ruling. In the absence of proof thereof, the presumption—at this late date—is that the claim of Hackley was disallowed and denied by the register and receiver; *such denial* was final, and *the appellants* are *precluded now from asserting title predicated upon such application.*

13 Peters, 511; 9 How., 332; 164 U. S., 345.

The lands having been segregated from the public domain prior to the enactment of April 22, 1826, the said act could not apply to such reserved lands.

The third ground of demurrer to which we invite the attention of the court is:

"The act of April 22, 1826, making the act of Feb. 5, 1813, operative in Florida, did not and could not have a retroactive effect upon the unlawful entry upon and possession of the lands described in complainant's bills by the said Robert J. Hackley, for the reason that prior to the enactment of April 22, 1826, the said lands had been entered upon and taken possession of by the Government, and the Government continued in possession thereof until the same were platted and offered for entry in 1883."

It is necessary briefly to refer to the facts pertaining to the connection of R. J. Hackley and his administrator with the "Fort Brooke military reservation." Counsel for appellants have discussed this question upon the theory that Hackley made his claim to the lands in 1826. And while repeatedly admitting that Hackley had no claim and asserted no claim to the lands prior to the act of 1826, yet declaring with much emphasis that Hackley was a *bona fide* settler in 1823 and 1824.

We have already shown that Hackley was not and could not be a *bona fide* settler in the absence of the assertion of some lawful claim and right, or ownership of some character. The facts as appear from the allegations of the bill—and by such allegations the appellants are bound—are that Hackley, without any authority and in absolute violation of law, went upon the land, which was afterwards known as the Fort Brooke cantonment, in November or December, 1823, and remained there until February, 1824, when the military authorities took possession of the property by direction of the Secretary of War. This fact is found by the decisions of the Secretary of the Interior, Honorable John W. Noble (p.

39, Trans.), and by Secretary Hoke Smith (pp. 46 and 47, Trans.). Such finding is conclusive and cannot be reviewed by the courts.

The President of the United States, by executive order, formally declared the Fort Brooke cantonment a "military reservation" containing sixteen square miles of land, embracing lands involved in this suit, on December 10, 1830 (Trans., p. 5). After vacating the lands in February, 1824, nothing is heard of Hackley until some time in 1835, when he filed the five affidavits attached to complainants' bill (Trans., pp. 18 to 21, inclusive).

No declaratory statement, no petition, no claim of the land is asserted, but simply affidavits that he had made improvements, resided upon, and cultivated this spot selected by General Brooke as the site since known as "Cantonment Brooke."

A land office was established in the State of Florida at St. Augustine in 1828; subsequently an office was established at Newnansville, Florida, and on November 27, 1843, Hackley filed with the register at Newnansville certified copies of the affidavits above referred to and addressed a letter to the register, claiming the right of pre-emption to the tract of land known as "Cantonment Brooke." No designation as to what part of it was claimed nor the acreage claimed (Trans., p. 8).

Hackley died in 1845. This property remained as a permanent "military reservation" until 1883. No action was taken by either the heirs or the administrator of Hackley's estate in the assertion of any right of pre-emption until September 26, 1887. In the meantime the lands were put upon the market by the Government, Carew's entry was made, he went into possession of the property, cultivated and improved it, remained in possession until his death, and his widow has remained in possession continuously to the filing of the bill herein, except as to those parts thereof sold to and occupied by others. Hackley's administrator waited nearly six years

before asserting any claim and did not then file any proper paper until the 14th of October, 1887. This affidavit or declaratory statement appears at page 22, Transcript. In this affidavit the administrator claims under the acts of April 22, 1826, February 5, 1813, and July 5, 1884, thus admitting that the property was to be disposed of under the provisions of the act of July 5, 1884. Mrs. Carew was at that time in actual possession of the property under the homestead claim of her husband.

These are the facts in accordance with the allegations of complainants' bills and as appear from the finding of the several Secretaries whose decisions are attached to and made parts of the bill.

Upon the subject of this reservation Mr. Secretary Smith says:

"The heirs of Hackley, however, relying upon the provisions of the above-quoted act of 1826, contend that the cantonment which existed from 1824 to 1830, was not such a reservation as will defeat the pre-emption rights of said heirs under the act of 1826.

His position is that when the act of 1826 confirmed in all settlers upon those lands prior to January 1, 1825, the right to purchase the lands whereon they resided, etc., no mere occupancy by the military nor even constructive reservation of an inferior order or dignity could defeat the operation of such an act of Congress.

In support of this position counsel cites the case of Johnson *vs.* The United States, Second Court of Claims, 391. Johnson's claim was based upon what was known as the "Oregon donation act," and, as required by that act, he had settled upon and occupied the land in controversy for four years continuously, with nothing left to be done to secure the patent but to make proof of the same, when the tract was forcibly taken and occupied by the troops of the United States "without the knowledge of the President, the Secretary of War, or any high officer of the Government." In that case the court

held that such occupation was not a reservation within the meaning of the "Oregon donation act," and could not affect the rights of the plaintiff.

In the case at bar, however, the facts are very different. The tract was known as the Fort Brooke military reservation, and was occupied under the direction of the Secretary of War two years before the passage of the act upon which the claim of the Hackley heirs is predicated.

In further support of his views counsel recites the history of Camp Stambaugh, in Wyoming Territory.

It appears that in 1870 the Secretary of War established said military post, which was laid off as a reservation and included all the territory within one mile of the flagstaff erected at the post. In 1881 the Secretary of War notified the Secretary of the Interior that said post, being no longer needed for military purposes, had been discontinued. In said communication he expressed the opinion that inasmuch as there had been no formal reservation of the lands included therein by the President the same might be restored to the public domain, as other lands, without the consent of Congress.

The Secretary of the Interior concurred in this opinion, and said lands were treated as having been restored to the public domain by the act of abandonment, and the subsequent notification on the part of the Secretary of War.

I am unable to see wherein the correspondence above referred to sustained the contention of counsel; for while it may be true that a military post established by the Secretary of War may be restored to the public domain with less formality than if it had been reserved by a former order of the President, still, the Secretary of War had authority to establish Cantonment Brooke, and by virtue of such establishment the lands upon which it was located were not subject to entry so long as unrelinquished.

Where a military post or cantonment is established upon

the public domain, whether the same be for temporary purposes or permanent occupation by the military, if it be done by competent authority, the lands included therein are not subject to entry until properly restored to the public domain.

If the Secretary of War has the authority to establish a military post, it follows that during the time that the lands included therein are occupied for military purposes they are not subject to disposal under the pre-emption laws. In the case of Wilcox *vs.* Jackson, 13 Pet., 498, it was held as follows:

"The President speaks and acts through the heads of the several departments in relation to the subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War Department. Hence we consider the act of the War Department in requiring this reservation to be made, as being in legal contemplation the act of the President; and consequently, that the reservation thus made was, in legal effect, a reservation made by order of the President, within the terms of the act of Congress."

It is further held in said case as follows:

"But we go farther and say that whensoever a tract of land shall have once been legally appropriated to any purpose from that moment the land thus appropriated becomes severed from the mass of the public lands, and that no subsequent law or proclamation, or sale, could be construed to embrace it, or to operate upon it, although no reservation were made of it."

The counsel for the Hackley heirs further contends that the cantonment did not cover the whole of the one hundred and sixty acres to which Hackley's claim attached, and that the appropriation by the military did not, therefore, extinguish his claim to that portion which lay outside the limits of the cantonment.

Counsel insists that inasmuch as the buildings erected for

the accommodation of Cantonment Brooke were located upon what is now known as lot 9 of said tract, that said encampment was therefore limited to the lot upon which said buildings were erected.

This is untenable for the reason that it is necessary for the convenience of the military to appropriate a considerable area of the public domain for wood, water, and other purposes, and the fact that Hackley was ejected from his entire claim was itself an appropriation thereof.

In accordance with the views hereinbefore expressed, therefore, the claim of the Hackley heirs is denied.

"The provisions of the act just mentioned have no application in adjusting any claim made to the land in controversy, for the reason that said land had been segregated and occupied by troops in cantonment for two years, at the date of its passage."

"No entry or sale of any land reserved for the use of the United States or either of the States can be made."

Rector *vs.* U. S., 92 U. S., p. 698.

In this case settlement was alleged and proven as early as 1809. The claimant settled on the land before survey, and was diligent in application to pre-empt, immediately after survey made and plat filed. Claimants also claimed the benefit of a subsequently-enacted enabling act which made the act of February 5, 1813, operative, but prior to this these lands were reserved by the Government. The court decided that, having been reserved before the claimants acquired any vested rights, same were not subject to pre-emption.

"No right can be acquired by cultivation, or possession of land severed from the public domain by a legal appropriation of it for any public purpose. It is not subject to the pre-emption law."

United States *vs.* Fitzgerald, 15 Pet., 407.
Frisbie *vs.* Whitney, 9 Wall., 187.
Hale *vs.* Gaines, 22 Howard, 144.

But counsel for appellants claim that the occupation of the troops of the United States from 1824 to 1830 did not constitute a reservation.

It is not material for the purposes of this case to discuss that proposition. It is admitted by complainants' bill that the property involved was formally reserved by proclamation of the President on the 10th of December, 1830, and the decisions of the Secretaries above referred to hold and find that the lands were so reserved. The lands were occupied continuously by the Government from 1824 until restored to the public domain in 1883. Unquestionably at the time that Colonel Brooke took possession of the property Hackley had no claim, nor did he assert any claim, and the taking possession of the property for the purposes of the military authorities was at that moment a legal appropriation of it for a public purpose.

Counsel for appellants have quoted from the case of U. S. *vs.* Fitzgerald, 15 Pet., at page 418, as follows:

"It cannot be contended that the land in controversy was reserved from sale by any act of Congress, or by order of the President, unless the direction of the Secretary to reserve it from sale several months after it had actually been sold and paid for, could amount to such order, etc."

This citation is inapplicable to the case at bar. There is no allegation in the present bill that the "Ft. Brooke reservation" was made after the lands were sold and paid for, nor that the Government ever received one cent from Mr. Hackley, nor that he ever complied with any of the conditions and requirements of the acts under which complainants claim.

But, as stated by Mr. Secretary Smith, "the lands were occupied by the Government more than two years before the passage of the act of April 22, 1826, and were formally reserved by the executive order of the President five years before Mr. Hackley ever asserted any claim, or that the Government knew that he contemplated doing so.

The President's authority to create reservations was once for all set at rest in the case of Grisar *vs.* McDowell, 6th Wallace, page 379. And even as early as 1827, in construing the act of May 8, 1820, the Supreme Court recognized such reservations. In the case of Chotard *et al. vs.* Pope *et al.* this court says:

"The right to enter is identified with the right to purchase at private sale, and confined to the appropriation of such lands as may be legally appropriated by entry at the register's office; from which are excluded all lands previously appropriated, whether by sale, or by being withdrawn from the mass of lands offered for sale."

"From the earliest date of the legislation of Congress on this subject, there have been appropriations to the public use made by withdrawing from this mass certain portions of territory for public seminaries, towns, salt springs, mines and other objects, and the particular land in controversy was appropriated under a provision of the law, etc."

Walsey *vs.* Chapman, 101 U. S., 755; 12th Wheat., 588.

In discussing this demurrer counsel for appellants assume that the act of April 22, 1826, created in Robert J. Hackley an estate *in presenti*, and that his rights became vested immediately upon the passage of the act and without the performing of any of the conditions prescribed by this act, and by the act of February 5, 1813, on the part of Hackley. They cite a number of authorities to sustain this contention, but upon an examination of such authorities the court will see that all of the cases cited have reference to land grants made to railroads or other corporations or to the States for school or other public improvement purposes. In every case cited we *assert, without fear of contradiction, that the grant is made to a specific grantee named in the act.* These authorities, therefore, can have no application to the case at bar.

N. Y. Indians *vs.* U. S., 170 U. S., 18.

Hall *vs.* Russell, 101 U. S., 503.

Mo., Kan. & Tex. R. Co. *vs.* Kan. Pac. R. Co., 97 U. S., 491.

At the time that Hackley filed his affidavits in 1835 and at the time he wrote the letter to the register of the district land office at Newnansville, Fla., in 1843, this land was not subject to entry. On both dates the land was actually occupied by the Government as a permanent military reservation. Being thus segregated from the public domain, he could not acquire any rights by such attempted pre-emption. But counsel for appellants contend that in 1883, when the land was restored to the public domain, Hackley's claim having been suspended during the Government occupancy of the land, his right to pre-empt then and there accrued, and that this right descended to his heirs or legal representatives. This contention is not well taken.

In the case of U. S. *vs.* So. Pac. R. R. Co. this court held that the grant to the company, using the words "that there be and is hereby granted, etc.," was a grant *in presenti*. But the court further held that the title did not attach to any specific sections of land until they were capable of identification, and set aside and canceled the patents that were issued to the Southern Pacific R. R. Co., notwithstanding the fact that the company had built its railroads and spent millions of dollars in improvement of the property.

And further uses this language:

"It was held in the case of The Kansas Pac. R. R. *v.* Dunmeyer, 113 U. S., 629, that where a homestead right had attached to a tract at the time of the definite location of the railway company's line, which homestead was afterwards abandoned, the tract was simply restored to the public domain, and did not pass to the railway company under its grant; that the grant only attached to lands which were subject to the grant at the time, and that the company had no interest in the question as to what afterwards became of a tract which was not public land at the time its grant became fixed."

On page 644, the court observed:

"The right of the homestead having attached to the land, it was excepted out of the grant as much as if in a deed it

had been excluded from the conveyance by metes and bounds."

The same doctrine was affirmed in Hastings & D. R. Co. *vs.* Whitney, 132 U. S., 357; Sioux City & I. F. T. L. Co. *vs.* Griffey, 143 U. S., 32; Bardon *vs.* Northern Pac. R. R. Co., 145 U. S., 535, and in the case of The So. Pac. R. R. Co. *vs.* Bell, 183 U. S., 675 to 690.

In the case at bar Hackley was never in possession of this property under any claim of title. He made no valuable improvements upon the property. No wrong can possibly be done to Hackley or to his heirs, the only possession asserted being a *temporary occupancy without claim of title.*

After the lands were restored to the public domain the legal representative of the estate of Hackley made no effort to procure this land for five years. Entry was made by Carew; Carew went into possession of the property and continued to occupy it; he and Mrs. Carew have made improvements upon the property, have developed it, and, so far as Hackley's heirs were concerned, remained in peaceable possession of the property for five years before any claim was asserted on the part of the Hackley heirs.

1st. It is clear, therefore, that the lands in controversy were actually occupied by the United States Government, through the War Department, at the time of and two years prior to the passage of the act of April 22, 1826, and thus used for public purposes, and thereby segregated from the public domain.

2d. That the occupation of Hackley, between November, 1823, and February, 1824, being an unlawful occupancy, could not vest in him any lawful claim to the land, it being admitted by the pleadings and by the argument of counsel that in residing upon the land Hackley had no claim and asserted no claim, but recognized the ownership of the United States Government. Hackley therefore could acquire no

inceptive right of pre-emption by the temporary occupancy of the lands of another.

3d. The lands involved became, on the 10th of December, 1830, by Executive order, a permanent "military reservation," thereby permanently segregated from the public domain five years before the assertion of any claim by Hackley to any part thereof.

4th. That no right or interest in the land could have possibly accrued to or vested in Hackley until the notice to the register, in 1835, and at the time of the filing of that notice the United States, the owner of the fee in the property, was occupying and using the lands for public purposes by authority of law, and the lands were not subject to public or private entry, and no right of title therein could possibly have vested in Hackley or any one else claiming under the act of April 22, 1826, and July 5, 1813.

5th. The lands involved were at the time and date of the notices of claim made by Hackley lawfully segregated from the public domain and were not subject to entry. Upon the restoration thereof to the public domain, in 1883, the land was subject to disposition under the laws existing at the time of such restoration, and no right thereby accrued to Hackley or to his heirs. The property was regularly and legally disposed of in accordance with the existing laws, and no error was committed by the Secretaries in the disposition of the property.

This demurrer is therefore well taken, and the lower court committed no error in sustaining the same and dismissing complainants' bill, nor did the Court of Appeals commit any error in the affirmance thereof.

Robert J. Hackley did not conform to the requirements of the acts of April 22, 1826, and February 5, 1813, and acquired no vested rights thereunder; hence his heirs, the complainants, could not, and did not, acquire any interest therein.

We will discuss the fourth and fifth grounds of demurrer together, being as follows:

4th. It appears from the allegations of complainants' bills and from the exhibits attached thereto that Robert J. Hackley did not, and could not in his lifetime, conform to the requirements of section 1 of the act of Congress of April 22, 1826, and of section 2 of the act of Congress of February 5, 1813, and therefore acquired no rights thereunder.

5th. Robert J. Hackley having failed to acquire any vested rights in and to the lands described in complainants' bills, at the time of his death he had no interest in such lands which could descend to his heirs, the complainants herein.

Both Secretary Noble and Secretary Smith have decided that Robert J. Hackley did not conform to the requirements of section 1 of the act of April 22, 1826, and of section 2 of the act of February 5, 1813. It is clear that Hackley could not have conformed to the requirements of these laws. The surveys were not made until many years after his death. The plat of the survey was first filed in the local land office at Gainesville, Florida, on March 22, 1883. These are admitted findings of fact that cannot be reviewed by the courts.

It is contended by counsel for the complainants that when Hackley presented his affidavits to the register at St. Augustine that this was a complete and full compliance with the law. But the act of April 22, 1826, requires a compliance with the terms, conditions, stipulations, restrictions,

and provisions of the act of February 5, 1813. That act requires the payment of a small fee to the register. The register had no authority to file these affidavits *unless accompanied by a notice of the claim, wherein the claimant shall designate the quarter section which he claims and shall pay to the register for such filing twenty-five cents.* There is no evidence that such notice was ever given. It could not have been given, because such notice involved a survey in order to designate the quarter section.

This act requires, further, that any person who has delivered his notice of claim is entitled, according to the provisions of the act, to a preference in becoming the purchaser of a quarter section of land. Such person so entitled shall have a right to enter the same with the register of the land office on producing his receipt from the receiver of public moneys for at least one-twentieth part of the purchase money, as in the case of other public lands sold at private sale.

There is no allegation that Hackley ever applied for or received any receipt from the receiver of public moneys, nor that he ever paid or tendered to the receiver of public moneys any portion of the purchase-money for the said lands. There is no allegation, nor is there any evidence, nor is there any contention that Hackley ever had any communication with or any dealings with the receiver of public moneys. The only officer authorized by law to receive public moneys, and thereby to commit the Government to the sale of any of its property under the pre-emption laws, was the receiver of public moneys. The entry could not precede these requirements, but must have followed such requirements. These requirements were conditions precedent to the acquiring of any legal rights on the part of the proposed pre-emptor. The act of April 22, 1826, cannot by any process of reasoning be construed to mean the absolute conveyance of title on the part of the Government, it merely declaring that certain persons qualified to receive should

have a preference in the right of purchase, provided they conformed to certain conditions and requirements of the act of July 5, 1813.

Hutchings *vs.* Low, 15 Wall., 77.

As early as 1827 this court defined the meaning of the word "enter" or "entry" in the case of Chotard *et al. vs.* Pope *et al.*; says the court:

"It means that by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim in the office of an officer known in the legislation of several States by the epithet of an entry-taker, etc."

12th Wheat., page 588.

As early as 1822, in the case of Mathews *vs.* Zane *et al.*, Chief Justice Marshall, for the court, declared "that the payment of the money required by the act is obviously indispensable to the purchase. Without such payment the sale prescribed by law could not be made; and certainly no sale, had the register attempted to make one, could be valid, if made in opposition to the law." But in this case there is no evidence, even that the register filed these affidavits. *They have* no file *marks upon* them; they *are not certified;* they *have no authenticity;* they *did not identify the property;* they referred to the Fort Brooke cantonment, which, at the time of the making of these affidavits, embraced 16 square miles. And the court will observe from examination of the exhibits to the bill that before the Interior Department it was contended by counsel for the Hackley heirs that the property beyond and exclusive of the actual occupancy by the Government troops was not reserved and that these heirs were entitled to the other lands, exclusive of lot 9, which is now expressly and specially claimed by them. This *contention was* really an *abandonment of the claim of lot* 9, *whereon the houses and improvements* are *alleged to have been situated* (opinion Secretary Smith, p. 49, Trans).

If, then, Hackley did not conform to the specific and essential requirements of the law under which his heirs claim, did he have such title or vested right as could descend to his heirs?

If the complainants in this case recover at all, it must be by inheritance from the deceased. This court has repeatedly held that there must have been such vested right to entitle recovery by the heirs, and has declared the doctrine that such vested right cannot be acquired by occupancy and cultivation of unsurveyed public lands.

"A person cannot acquire, by his occupation only, of unsurveyed lands of the United States, a right of pre-emption to them under the laws of the United States. Where nothing was done by an occupant of public land beyond his occupancy, and his death occurred two years before the surveys were made, the privilege of purchasing the land was not acquired by him so as to be available to his heirs."

Buxton *et al. vs.* Traver *et al.*, 130 U. S., 232.

Robert J. Hackley having failed to acquire any vested rights in the lands involved, at his death he had no interest therein which could descend to his heirs, the complainants herein. The statement or proof of Hackley in 1835 and refiled in 1843 was premature and gave him no rights.

Lansdale *vs.* Daniels, 100 U. S., 113.

Under the early acts of Congress pre-emption rights did not descend to the heirs of a pre-emptor. The act of March 3, 1843, made provision for this.

Rev. Stat., sec. 2269.

This act was construed by this court in the case of Buxton *et al. vs.* Traver *et al.* In that case it is held:

"That section 2269 of the Revised Statutes does not give to heirs of a deceased occupant of unsurveyed public lands, who, during his life, did nothing beyond its occupation and

improvement, the same rights which are conferred upon heirs of a person entitled at the time of his death to the benefit of the pre-emption laws."

130 U. S., 232.

Hutchings *vs.* Low, 15 Wall., 77 (Yosemite Valley case).

Frisbie *vs.* Whitney, 9 Wall., 187.

Gonzales *vs.* French, 164 U. S., 346.

It is only *where the pre-emptor has paid his money and obtained the register's certificate of purchase* that his "right of pre-emption" has been merged in emption. This principle is asserted by Attorney General Speed, 11 A. G. Op., 462, where he says: "It is not to be doubted that settlement on the lands of the United States, no matter how long continued, confers no right against the Government. The land continues subject to the absolute disposing power of Congress until the settler has made the required proof of settlement and improvement and has paid the requisite purchase-money." This principle has been received and acquiesced in by the Secretaries of the Interior, and has come to be the recognized rule of action in that Department. This construction of the law has also been asserted by the courts of last resort in several States.

Frisbie *vs.* Whitney, 9 Wall. (U. S.), 187.

Bower *vs.* Higbee, 9 Mo., 261.

Phelps *vs.* Kellogg, 15 Ill., 135.

Grand Gulf R., etc., Co. *vs.* Bryan, 8 Smed. & M. (Miss.), 268.

People *vs.* Shearer, 30 Cal., 650.

Hutton *vs.* Frisbie, 37 Cal., 475.

Did Hackley acquire any rights by the unlawful possession of the lands of the Government?

The sixth ground of the demurrer is: It does not appear from the allegations of complainants' bills that Robert J. Hackley was ever in lawful possession and occupancy of the lands described in said bills, or any part thereof.

The occupancy alleged on the part of Hackley was between November or December, 1823, and February, 1824.

The appellants' counsel argue that the act of Congress did not require lawful possession, but actual inhabitance and cultivation.

The word "inhabit" is defined to be "*to occupy as a home, or to remain in as a permanent place of abode, or fixed residence.*" An inhabitant is one who resides actually and permanently in a given place and has his domicile there.

Black's Law Dictionary; 40 Ills., 197.

A mere temporary possession as was held by Hackley in violation of law cannot constitute a habitation as contemplated by the act of Congress. The possession in the sense of acquiring a right or privilege is necessarily a lawful possession—that is, a possession in good faith by one who believes that he has a right to the possession.

Black's Law Dictionary.

One who knows that he is not entitled to the possession is termed a possessor *mala fide.*

Black's Law Dictionary.

This is the view adopted by the Land Department.

Secretary Noble says:

"By the law in force at the date of Hackley's said settlement, persons were not allowed to settle upon any of the lands of the United States, except as tenants at will, under contract to be entered into with the local land officers. See act of Congress approved March 3, 1807 (Stat., 445); act of

March 30, 1822, sec. 9 (3d Stat., 654). There can hardly be serious question, I think, that when the officers of the Government selected the site of the said reservation, Hackley had no rights thereto. His settlement was clearly illegal, and by the express terms of said act of 1826, said reservation being rightfully claimed as a reservation, was excepted from its provisions."

Secretary Smith says:

"It further appears that in March, 1824, in obedience to instructions from the War Department, that portion of said reservation now in controversy, was occupied by the United States troops in cantonment and was so used until Dec., 1830, and when it was formally reserved by executive order in which its limits were fixed at sixteen miles square. Subsequent to this, said lands were in a state of reservation the greater portion of the time, until Jan. 4, 1883, when they were relinquished and finally restored to the public domain.

"R. J. Hackley was ejected from the land by the military in 1824.

"At that time, the provisions of the act of March 3, 1807, (2 Stat., 445) were in force in the State of Florida, having been re-enacted in the act providing for the establishment of a territorial government in said State on March 30, 1822 (3d Stat., 645). The first sections of the act of March 3, 1807, *supra*, provided:

"'That if any person or persons, shall after the passage of this act take possession of, or make a settlement on any of the lands ceded or secured to the United States by any treaty made with a foreign nation, or by a cession from any State to the United States, which lands shall not have been previously sold, ceded or leased, by the United States, or the claim to which lands, by such person or persons, shall not have been previously recognized and confirmed by the United States, or if any person or persons shall cause such land to be thus occupied, taken possession of, or settled, or shall survey, or attempt to survey, or cause to be surveyed any such lands, or designate any boundaries thereon, by marking trees or otherwise, until thereto duly authorized by law, such offender or offenders shall forfeit all his or their right, title and claim, if he hath, or they have, of whatsoever nature or kind the same shall or may be, to the lands aforesaid, which he or they shall have taken possession of, or

settled, or caused to be occupied, taken possession of or settled, or which he may, or they shall have surveyed, or aitempted to survey, or cause to be surveyed, or the boundaries thereof, he or they shall have designated, or caused to be designated, by marking trees or otherwise.'

"When R. J. Hackley was ejected from said land by the military in 1824, he could not, in view of the provisions of the act above quoted, have initiated any claim to said lands by virtue of his settlement."

These are findings of fact from the evidence before the Interior Department, and are conclusive. They are fully sustained by the statutes then in force.

2d Stat., 445.

3d Stat., 654.

No declaratory statement was filed by the administrator of the estate of Robert J. Hackley nor by the heirs of the deceased (complainants) within three months after the receipt and filing in the district land office of the approved plat of the township embracing the alleged pre-emption settlement.

This point is specifically raised by the seventh ground of the demurrer, as follows:

"It does not appear in and by the allegations of complainants' bills that a declaratory statement was filed by the administrator of the estate of Robert J. Hackley, or by his heirs, within three months after the receipt and filing at the district land office of the approved plat of the township embracing the alleged pre-emption settlement as required by sections 2266 and 2269 of the Revised Statutes of the United States, and a failure to file said declaratory statement within the time prescribed by the act of Congress, was a forfeiture of any rights Robert J. Hackley, or his estate, or his heirs, may have acquired by virtue of the alleged settlement upon said Government lands."

The act of February 5, 1813, provides, among other things, that the party shall produce his receipt from the receiver of public moneys for at least one-twentieth part of the purchase-money, as in the case of other public lands sold at private sale. This would indicate clearly that these pre-emption filings were to be made in accordance with the rules and regulations of the Land Department of the Government—that is to say, in accordance with the usual system in the making and filing of pre-emption entries in the land office. It was required by the act that these entries should be made in the district land office where the land was situated, thus showing that it was not the intention of Congress to make this an exclusive jurisdiction, different and distinct from all other methods of pre-emption. The only difference being that the requirements as to the qualifications of the pre-emptor were different from other acts providing for the pre-emption of public lands.

But Hackley failed to perfect his pre-emption entry in his lifetime. The survey of the lands and the filing of the plat in the district land office at Gainesville, Florida, was subsequent to the act of May 30, 1862, embodied in section 2266 of the Revised Statutes. This section, requiring that the declaratory statement should be filed within three months from the date of the approved plat in the township embracing such pre-emption settlement, is therefore applicable to all such cases. It is a rule of construction of statutes that all consistent statutes must stand together, though enacted at different times, relating to the same subject.

Sutherland on Stat. Cons., sec. 283.

Also that a statute must be construed with reference to the whole system, of which it forms a part; and statutes upon cognate subjects may be referred to, though not strictly *in pari materia*.

Sutherland on Stat. Cons., sec. 284.

It certainly was necessary to file a declaratory statement after the plat was filed in the land office. This was essential under the statutes and rules of the Department in 1883, when the plat was filed.

The failure to do so was fatal to the claims of the complainants, and their suit must fail.

Lansdale *vs.* Daniels, 100 U. S., 1.
N. P. Ry. Co. *vs.* De Lacy, 174 U. S., 630.
U. S. *vs.* Fitzgerald, 15 Pet., 407.
Gonzales *vs.* French, 164 U. S., 338.
Johnson *vs.* Towsley, 13 Wall., 72.
Atherton *vs.* Fowler, 96 U. S., 513.

In the case of Moore *vs.* Robbins, 96 U. S., at page 538, the court says:

"Applying to the case before us these principles, which are so well established and so well understood in this court as to need no further argument, we are of opinion, if we take as proved the sufficiency of the occupation and improvement of Bunn as of the date which he alleged, his claim is fatally defective in another respect in which the officers of the Land Department were mistaken as to the law which governed the rights of the parties, or entirely overlooked it."

In the recent case of Atherton *vs.* Fowler (*ante*, 732) we had occasion to review the general policy and course of the Government in disposing of the public lands, and we stated that it had formerly been, if it is not now, a rule of primary importance to secure to the Government the highest price which the land would bring by offering it publicly at competitive sales, before a right to any part of it could be established by private sale, or by pre-emption. In the enforcement of this policy the act of September 4, 1841, 5th Stat. at L., 457, which for the first time established the general principle of pre-emption, and which has remained the basis

of that right to this day, while it allowed persons to make settlements on the public lands as soon as the surveys were complete and filed in the local land office, affixed to such a settlement two conditions as effecting the right to a pre-emption. One of these was that the settler should give notice to the land office of the district, within thirty days after settlement, of his intention to exercise the right of pre-emption, and the other we will give in the language of the 14th section of that act:

"This act shall not delay the sale of any of the public lands of the United States beyond the time which has been or may be appointed by the proclamation of the President, nor shall any of the provisions of this act be available to any person who shall fail to make the proof of payment and file the affidavit required before the commencement of the sale aforesaid."

5 Stat. at L., 457.

"Whatever Bunn may have done on the 8th of November, and up to the 15th of that month, in the way of occupation, settlement, improvement, and even notice, could not withdraw the land from sale at public auction unless he had also paid, or offered to pay, the price before the sale commenced."

No effort was made by the Hackley heirs to secure this land until the 14th of October, 1887, and then the administrator of Hackley attempted to file his declaratory statement and to make pre-emption entry, not only under the acts of April 22, 1826, and February 5, 1813, but also claiming the benefit of the act of July 5, 1884. We beg to invite the attention of the court to the fact that the administrator did not first pay the receiver one-twentieth part of the purchase price and take his receipt therefor, and present this receipt to the register as required by the act of February 5, 1813, but he declares that he tenders the Government price of $1.25 per acre, together with the required Government fees in the paper referred to, showing that he adopted the rules

and regulations of the Department and abandoned the contention that he was to act exclusively under the acts of 1826 and 1813. And at this time it should be remembered that Lizzie W. Carew and husband had been in the actual, lawful, open, and adverse possession of this property, under claim of title by virtue of the homestead entry of E. S. Carew, for nearly five years.

But counsel for appellants argue that the survey was suspended and complainants could not file declaratory statement. No such fact has been alleged or shown by the record. The survey was not suspended. The Commissioner suspended further *entries*, but not the surveys. Other claimants made attempts to pre-empt and presented their claims through the Land Department. The administrator of Hackley waited more than five years before even making an attempt to file a declaratory statement. A pre-emptor has only a preference right, and if he fails to assert his claim within the statutory period, that right is lost, and the settler next in line of preference takes the land.

Johnson *vs.* Towsley, 13 Wall., 72.

Neither proof nor payment were made for the land by Robert J. Hackley, or his heirs, within thirty months after the date prescribed therein for filing declaratory notices had expired as required by sec. 2267 and 2269, of Revised Statutes of United States.

"The failure of a pre-emption claimant to make proof and payment within the thirty months required by the U. S. Rev. Stat., sec. 2267, forfeits his right without any cancellation on the records."

"When no proof and no payment have been made within the time provided for by law, the record will show the fact, and that the right of the claimant has expired and the claim has ceased to exist."

North. Pac. R. R. Co. *vs.* De Lacy, 174 U. S., 622.
Gonzales *vs.* French, 164 U. S., 343.
Johnson *vs.* Towsley, 13 Wall., 72.
Atherton *vs.* Fowler, 96 U. S., 513.

All of the pre-emption laws restrict the pre-emptor in the time of the filing of his declaratory statement and in the making of his proof, and the courts have invariably sustained the officers of the Interior Department in the enforcement of such restrictions and requirements.

Johnson *vs.* Towsley, 13 Wall., 72.
Lansdale *vs.* Daniels, 100 U. S., 113.

"Such a notice, if *given before* the time allowed by law, is *a nullity*, but where it is filed subsequently to the period prescribed, it is operative and sufficient, unless some other person had previously commenced a settlement and given the required notice of claim."

Johnson *vs.* Towsley, 13 Wall., 72.
Moore *vs.* Robbins, 96 U. S., 530.
Morrison *vs.* Stalnaker, 100 U. S., 213.

The decision of the Secretary of the Interior that Robert J. Hackley and his administrator had failed to comply with the pre-emption laws in force, and that his heirs were not entitled to the land in controversy, is a mixed question of law and of fact, and cannot be reviewed by the courts (9th ground of demurrer).

The decision of the register and receiver and of Acting Commissioner Stone, predicated upon the hearing in 1889, cannot be invoked in this case to substantiate the claims of the complainants, for the reason that both of the said decisions were reversed and annulled by the action thereon had and taken by the Secretary of the Interior, Hon. J. W Noble, and subsequently by the Secretary of the Interior, Hon. Hoke Smith, upon the final review of the case. Certainly the decision of Secretary Noble declined to award the land to the Hackley heirs because of the failure of Hackley

in his lifetime to conform to the requirements of the acts of Congress in force up to the time of his death.

Secretary Noble, while he does say that "the facts relative to his settlement do not appear to be disputed," and he does refer to the affidavits filed in 1835 and to the notice filed on November 27, 1843, also refers to the notice filed October 14, 1887. He further recited the act of April 22, 1826, and the act of February 5, 1813, to sustain his position, and says further: "Besides, by the law in force at the date of Hackley's said settlement, persons were not allowed to settle upon any of the lands of the United States, except as tenants at will, under contract to be entered into with the local land officers. There can hardly be serious question, I think, that when the officers of the Government selected the site of said reservation, Hackley had no right thereto. His settlement was clearly illegal, and by the express terms of said act of 1826, said reservation being rightfully claimed as a reservation, was excepted from its provisions." And says further that "the Government has never offered said reservation for sale. The War Department legally acting, by direction of the President, took possession of said land, and continued in possession thereof until it was relinquished to this Department for disposal under the laws then existing." He further states that Hackley had no vested right in and to said land in his lifetime, because his settlement was illegal in its inception, and at the date of his death he had no interest in said land which could descend to his heirs.

The Secretary, therefore, held:

1st. That Hackley made the settlement on the land, but that he did not conform to the acts subsequently enacted by Congress.

2d. That the property was legally reserved before the passage of the act of 1826.

3d. That Hackley's settlement was illegal in its inception.

4th. That the Government continued in possession of the property until relinquished to the Interior Department in 1883.

5th. That Hackley had no vested right in the property at the time of his death.

These points are mixed questions *of law* and *of fact*, and cannot be reviewed by the courts. The Secretary arrived at his conclusions from the facts submitted and established by the proofs.

Secretary Smith does state in his decision that Hackley entered upon the lands in 1823, did not relinquish his claim, and that "he made settlement in good faith so far as the record discloses, etc." And says:

"It further appears that in March, 1824, in obedience to instructions from the War Department, that portion of said reservation now in controversy was occupied by the United States troops in cantonment, and was so used until Dec., 1830; it was formally reserved by executive order in which its limits were fixed at sixteen square miles. Subsequent to this, said lands were in a state of reservation the greater portion of the time until January 4, 1883. That Hackley was ejected from the land in 1824."

And says further:

"When R. J. Hackley was ejected from said lands by the military in 1824, he could not, in view of the provisions of the act above quoted, have initiated any claim to said land by virtue of his settlement."

It is clear from the decision of Secretary Smith that he, too, decides that Hackley did not and could not comply with the act of 1826, because the same, as shown by the proofs, had been lawfully reserved. He finds as a fact that the

reservation was lawful, and fully sustains the views of Secretary Noble in regard to Hackley's claim.

"It is a well-established rule of law that in contests before the Land Department, the decision of the Secretary of Interior is final, except in cases of fraud, mistake, or an erroneous construction of law. The decision of the Secretary upon the facts of a case, and upon *mixed questions* of law and fact, is always final, and the decisions of the courts have generally sustained the Secretary, in the absence of positive fraud, or a mistake, wherein the unsuccessful party has been denied some right which materially affected his interests, or where misconstruction of the law has worked a hardship and injury upon an interested party."

25 Fla., 759, citing—

Quinby *vs.* Conlan, 104 U. S., 420.

The 10th ground of demurrer is as follows:

"The honorable Secretary of the Interior of the United States, having decided on March 8, 1898, as shown by Exhibit 'K,' to complainants' bills, that all of the defendants except Lizzie W. Carew, the sole heir-at-law of the original patentee, were innocent, *bona fide* purchasers, as shown by the evidence before the Interior Department, such fact became finally adjudicated, and cannot now be reviewed by the courts, and the bills in this cause, as to all of the defendants except Lizzie W. Carew, should be dismissed."

In considering this question, Secretary Bliss, in his decision, says:

"Another obstacle in the way of a successful maintenance of a suit to vacate these patents lies in the fact made to appear by affidavits and exhibits, that all, or nearly all of the land so patented, has been sold and conveyed to third parties. The presumption is that such parties are innocent purchasers for value and without notice of any defect in the title of the patentees, on account of fraud, or other infirmity."

Even if the patents were procured through fraud, unless they are absolutely void on that account such purchasers would be protected by the courts.

Appellants' counsel argue that the complainants are not precluded by the decision of Secretary Bliss, because they were not parties thereto. They are equally bound by the rulings of the Interior Department, whether parties thereto or not. They seek the benefit of the pendency of the proceeding of Bilbie *et als.* as an excuse for their laches in instituting this suit, and we submit that this being the final action of the Interior Department and made a part of the allegations of complainants' bill that the court will consider the findings of fact by Secretary Bliss and will uphold them.

The 11th ground of demurrer is as follows:

"11th. It appearing from the allegations in complainants' bills that patent issued on the 30th day of July, 1896, and that the title of all of the defendants who purchased from Lizzie W. Carew was predicated upon said patent, such purchasers are *bona fide* and legal in the absence of fraud, and complainants' bills should be dismissed as to all of the grantees of Lizzie W. Carew."

It is true the complainants allege that the defendants, other than Mrs. Carew, are not *bona fide* purchasers for value. But the decisions of the Department of the Interior, made parts of the bill, contradict in effect this allegation. Some of the defendants purchased from Williams *et als.*, and not from the patentee. In fact, all except Hall have deeds from Williams *et als.* Neither of the Williamses is made a party to this proceeding. If *bona fide* purchasers, then these bills must be dismissed as to such defendants.

Kearnes *vs.* Hill, 21 Fla., 185.
Levy *vs.* Cox, 22 Fla., 546.
Doyle *vs.* Wade, 23 Fla., 90.

What are the facts here? Two Secretaries decided that the Hackley heirs had no right, title, or interest in the land. These decisions are matters of record. The Hackleys waited four and a half years after patent issued and did not institute any proceedings to recover the property. Was there

any reason for a prudent man to anticipate this claim? Were not the final adjudication of the Interior Department, acting within its jurisdiction, and the issue of the patent sufficient to justify the honest belief of a prudent man that the patentee had a right to convey the legal title acquired from the Government?

The 12th ground of demurrer is:

"12th. There is no specific allegation of error of construction of law in complainants' bills, and in the absence of such specific allegations this suit cannot be maintained, and complainants' bills should be dismissed."

This court cannot take jurisdiction of a cause merely to interpret a statute or act of Congress. There should be some specific averment of mistake or fraud, supported by clear and satisfactory proof.

U. S. *vs.* Maxwell Land Grant Co., 121 U. S., 325.
Quinby *vs.* Colan, 104 U. S., 420.
Lansdale *vs.* Daniels, 100 U. S., 113.

This action is barred by the statute of limitations of the State of Florida.

This point is raised by the 13th ground of demurrer, to wit:

"It appears from the allegations of complainants' bills that patent issued for the lands involved in this suit to Edmund S. Carew on the 30th of July, 1896, more than four years before the filing of complainants' original bill, and this suit is barred by the statute of limitations of the State of Florida, par. 4, sec. 1294, of the Rev. Stats. of the State of Florida."

"Where it appears on the face of the bill that the bar of the statute has attached, objection may be made and defense raised by demurrer."

13 v. Pldg. & Pr., pp. 201, 206, and 101.
City of Apalachicola *vs.* The Apalachicola Land Co., 9th Florida, p. 340.

Actions of this character are not specifically provided for, and hence the section of the Rev. Stats. cited is applicable.

The supreme court of Florida has construed this section, and held that it applies to suits for dower and mesne profits.

Branch *vs.* Cole, 18th Fla., 368.

Counsel for appellants contend that the case of Branch vs. Cole is not applicable to the case at bar, and cite in support of such contention the cases of Wade *vs.* Doyle, 17th Florida, 532, and Sloan *vs.* Sloan, 25th Fla., 33. The case of Wade *vs.* Doyle was an ejectment suit, and the question of adverse possession against the true title was involved. Being an action involving the title to real property, it can have no application to the present case. The case of Sloan *vs.* Sloan was a suit in equity to remove a cloud from a title, and defendants all plead adverse possession and sought to establish title by adverse possession. The court properly held that such claim to be effective against the true title should be continuous for the period of seven years.

Neither of those cases involved any question of the declaration of a trust. The defendants in the case at bar do not claim by adverse possession, but claim that a declaration of trust is barred under the section of the Rev. Stat. above cited.

"A court of equity is governed by the analogies of the statute of limitations of a court of law."

Norris *vs.* Haggin *et al.*, 136 U. S., 386.
Stafford *vs.* Bryan, 1st Paige Ch., 236.
Kane *vs.* Bloodgood *et al.*, 7 John. Ch., 88.
11th Am. Dec., 417.
43d Am. Dec., 317.
46th Am. Dec., 534.
Baker *vs.* Cummings, 196 U. S., 188.
Also, very full notes.

If the plaintiff has been guilty of gross laches, or if he had not applied for relief until after a long lapse of time,

unexplained by equitable circumstances, his bill will be dismissed. A court of equity will not administer relief to gross negligence any more than a court of law.

7 Wait Acts & Def., 229.
Badger *vs.* Badger, 69 U. S., 89.
New Albany *vs.* Burke, 78 U. S., 96.
Sullivan *vs.* Portland, 94 U. S., 806.
Sanchez *vs.* Dow, 23 Fla., 445.
Brashier *vs.* Gratz, 6 Wheat., 528.
King *vs.* Hamilton, 4 Pet., 311–329.
Pratt *et al. vs.* Carroll, 8 Cranch, 47.

This subject is elaborately and ably discussed in the case of Edmendorf *vs.* Taylor *et al.*, 10 Wheat., 152 (see notes specially); also Thomas *vs.* Brockenbrough, 10 Wheat., 146.

The courts of the U. S. adopt the interpretation and construction of State statute given by the courts of the State, and will take notice of and enforce the public statutes of the State within which they are adjudicating.

McCleny *vs.* Stillman, 3 Pet., 270; note 10 Wheat.

One who is not a trustee, but upon whom the character is forced by a court of equity—only for the purpose of a remedy—may avail himself of the statute.

Baxton *vs.* Moses, 77 Maine, 48.
Carroll *vs.* Green, 92 U. S., 509.
2 Pom. Eq. Jur., 616.
10 Wheat, 174 (notes).
Beach on Trust and Trustees, sec. 208–209.

Appellants' counsel claim that this being a general demurrer to the whole bill, it should have been overruled because some of the complainants are minors, and cite from the courts of Texas and Georgia. These citations are

local in their application. No such principle prevails in the practice of this State, nor in the Federal courts. To avoid the plea of the statute of limitations it is necessary to show that all of the plaintiffs were under a disability to sue.

Marstellar *et als. vs.* McClean, 7 Cranch, 156.
A. & E. Ency. of Law, 2 Ed., v. 19, p. 183.

Again, in this case, under the act of April 22, 1826, *this proceeding should have been instituted by the legal representative of the deceased.* It is also provided that the pre-emption right can be perfected by the executor or administrator under section 2269 of the Rev. Stat. of the U. S. If the administrator could have instituted this proceeding, then he would be barred if four years' limitation applies. As the administrator would be barred, the statute is equally effective against the complainants, who are minor heirs.

Meeks *vs.* Olpherts *et al.*, 10th Otto, 564.

"There is no equity in complainants' bills" (14th ground of demurrer).

To entitle complainants to recover they must show a better right to the land than the patentee. It is not sufficient to show that the patentee ought not to have received the patent. It must appear by the law, properly administered, that the title should have been awarded to the complainants as heirs-at-law and distributees of Robert J. Hackley, deceased.

Sparks *vs.* Pierce, 115 U. S., 408.
Behall *vs.* Dilla, 114 U. S., 47.
Lee *vs.* Johnson, 116 U. S., 48.

It is only where the officers of the Interior Department have misconstrued the law applicable to the case, as established before the Department, and thus have denied the par-

ties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can, in a proper proceeding, interfere and refuse to give effect to their action.

Johnson *vs.* Towsley, 13 Wall, 72.
Shepley *vs.* Cowan, 91 U. S., 330–340.
Moore *vs.* Robbins, 96 U. S., 530.
Marques *vs.* Frisbie, 101 U. S., 473.
U. S. *vs.* Minor, 114–233.
Lee *vs.* Johnson, 116 U. S., 48.
U. S. *vs.* Iron Silver Ming. Co., 128 U. S., 579.
Quinby *vs.* Conlan, 104 U. S., 420; 25 Fla., 760–'1.

Not only have complainants failed to show any title of any character, but the record as disclosed by the pleadings of complainants shows conclusively that the entryman, Carew, was entitled to the land, and no error of law was committed by the Land Department of the Government in the final disposition of the land involved. If no error of law was committed, the complainants' suit must be dismissed.

Hawley *vs.* Diller, 178 U. S., 490.

Furthermore, under the departmental decision rendered by Secretary Noble on the 25th of November, 1892, the Government refused to allow Hackley's entry. Upon a review of this decision by Secretary Smith, he re-affirmed Secretary Noble's finding as to Hackley's claim. This was not a determination of priority or preference, but an absolute adjudication of the fact that the Government would not recognize the claims of Hackley or his estate or his heirs. Can the courts now declare that the Government shall so recognize these claims? There is no relation of trust and trustees between the Hackley heirs and Carew, for the Department had

already refused patent to the Hackley heirs. This exercise of discretion cannot be controlled by the courts.

U. S. *vs.* Land Co., 5 Wall., 563.

Cox, Sectry., *vs.* U. S., 76 U. S., 554.

Again, Hackley's claim was denied in his lifetime and no appeal taken to the Commissioner of the General Land Office. Under the rulings of the Department and the rules of practice in the Land Office, the decision of the register and receiver became final, unless appealed from within a stipulated time. Nor was the action of the register and receiver in 1887 appealed from when they denied the pre-emption claim, made by the administrator.

Will the courts override the rules and proceedings before the Land Department of the Government, and thus cause confusion and chaos? Has not the Interior Department the same authority to adopt and enforce rules of procedure as the courts? If so, then the complainants have no case (Hawley *vs.* Diller, 178 U. S., 488).

The claim of the Hackley heirs having been eliminated by the departmental decisions, as being without merit, the "Ft. Brooke reservation" was disposed of by the Secretary of the Interior under the existing law of Congress, the act of August 18, 1856—Stat. 11–87—which provides:

"That all the lands heretofore reserved for military purposes in the State of Florida, etc., shall be disposed of and sold in the same manner and under the same regulations as other public lands of the United States."

Secretary Smith, in his decision at page 7 *et seq.*, discusses the provisions of this act fully.

Again, Secretary Bliss, in considering the application of Bilbie *et als.* to set aside the patents of Carew *et als.*, gives the same interpretation to the act of 1856, and held that no error was committed by Secretary Smith, but that the lands were properly disposed of pursuant to the act of 1856 (de-

cision Secretary Bliss, p. 4 *et seq.*). The argument of Secretary Bliss is *logical, clear*, and *conclusive* of the question.

These bills are multifarious for misjoinder of parties and of equitable and legal causes of action.

This question is not raised by the demurrer of the defendants, but, being apparent upon the face of the bill, the court will take cognizance of it and dismiss complainants' bills.

Bauknight *vs.* Sloan, 17th Fla., 284.
Story's Eq. Pldg., sec. 236–237.

If the defendants hold the legal title for the use and benefit of the complainants, then complainants must either follow the specific fund or rely upon their legal remedy against the defendants. They cannot pursue both remedies in one action.

Beach on Trusts & Trustees, v. 2, sec. 690.
58th Amer. Rep., 61.
45 Amer. Dec., 642.
2 Johns. Ch. Rep., 441.

A *cestui que trust* when forced to rely upon his trustee's personal liability occupies a position towards the estate of the trustee which is no better but is identical with that of a simple contract creditor.

Beach on Trusts & Trustees, v. 2, sec. 690.
30th Cal., 17.
8th Amer. Dec., 141.

It is clear that there is no such community of interest on the part of the several defendants in this suit as to justify the filing of one suit against them. Certainly the amended bill cannot be maintained in this action.

Appellants' attorneys have discussed the question of forfeiture, and have cited a number of authorities.

The cases cited all refer to the forfeiture of land grants, made to States and Territories for the construction of railroads, and can have no application to this case. This class of cases refer to grants made *in presenti*, where vested rights are created by the act itself. No such rights are created by the acts of 1826 and 1813, as shown by the authorities which are cited in this brief.

The right of pre-emption, being merely a preference or privilege of entry, requires no forfeiture.

"The failure of a pre-emption claimant to make proof and payment within the thirty months required by the U. S. Rev. Stats., sec. 2267, forfeits his right, without any cancellation on the records."

"When no proof and no payment have been made within the time provided for by law, the record will show the fact, that the right of the claimant has expired and the claim has ceased to exist."

North. Pac. R. R. Co. *vs.* De Lacey, 174 U. S., 622.
Gonzales *vs.* French, 164 U. S., 343.
Johnson *vs.* Towsley, 13 Wall., 72.
Atherton *vs.* Fowler, 96 U. S., 513.

In conclusion we submit that the facts as disclosed by the bills and exhibits are:

1st. That Robert J. Hackley went upon the "Ft. Brooke cantonment" some time in 1823 (November or December) (affidavit of Hackley & Thomas), and made some improvements thereon, but made no claim thereto; that in March, 1824, he was ejected therefrom by the proper authorities; that he never afterwards went upon or occupied the land or any part thereof.

2d. That the land was formally and legally reserved by executive order as a military reservation on December 10, 1830, and remained a reservation for military purposes until relinquished on January 4, 1883. On March 16, 1883, an

approved diagram of the subdivision thereof into seven lots was transmitted by the Commissioner of the General Land Office to the register and receiver of the district land office at Gainesville, Florida. Same was received at Gainesville on March 22, 1883. Edmund S. Carew, husband of Lizzie W. Carew, made homestead entry on same date. Carew and his wife remained in possession of the land; he, to the date of his death, *and she, continuously until the present time*, except as to the parts sold to and occupied by her grantees.

3d. It is alleged that Hackley filed some affidavits with the register of the land office in 1835. On November 27, 1843, he addressed a communication to the register at Newnansville, claiming a pre-emption under the act of April 22, 1826. But it nowhere appears what proof was filed, if any, nor any other action taken by Hackley. Claim not allowed and no appeal taken therefrom.

4th. Hackley died in 1845 without acquiring any vested rights in the land.

5th. No action was taken by the administrator nor by the heirs until October 14, 1887—more than four and a half years after the plat was filed in the local land office at Gainesville, Florida, and lands occupied by Carew. Claim not allowed—no appeal therefrom.

6th. A full, fair hearing was given Hackley's heirs, and the Honorable Secretary Noble decided adversely to their claims November 25, 1892. This decision was affirmed by Secretary Smith in July, 1894.

7th. Patent issued to E. S. Carew July 30, 1896. Application was made to have vacated. Secretary Bliss denied and dismissed the application. The appellants sat by and waited until all others failed to vacate the patent, and now, four

and a half years after patent issued, seek to have defendants' title conveyed to them. Here is the *grossest* and most inexcusable laches.

8th. The facts appear that Hackley did not conform to the act of 1826, which he invoked in letter to register in 1843, nor did he conform to requirements of act of February 5, 1813.

9th. The administrator and heirs did not attempt even to conform to the pre-emption laws.

10th. The Secretary found as a fact that there was a non-compliance with the several acts of Congress by Hackley and by his legal representative and by his heirs.

11th. The Secretary found as a fact that the land was subject to entry March 22, 1883; that Carew was the first entryman; that his entry was in good faith, and that Lizzie W. Carew was entitled to have the land patented to the estate of her husband.

12th. The Secretary decided as a fact that Hackley acquired no vested rights that could or did descend to his heirs.

13th. That all of the defendants other than Lizzie W. Carew are *bona fide* purchasers and their rights and interests are separate and distinct from those of Lizzie W. Carew, and are not proper parties to this suit.

14th. That neither Hackley nor his legal representative has ever made proof, or attempted to make proof, to entitle him to patent, either in accordance with the act of April 22, 1826, and the act of February 5, 1813, or in accordance with the existing acts of Congress or the rules and regulations of the Interior Department.

15th. That no specific error in the construction of law by the Secretaries of the Interior Department has been alleged or shown that would justify review or interference on the part of the court.

We submit that the courts below committed no error in sustaining the several grounds of demurrer, and the decrees of the lower courts should be affirmed.

Respectfully submitted.

WM. WADE HAMPTON,
Of Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 52.

SALLIE FIELD SCOTT, ELIZA MADISON SCOTT, HARRIET B. JONES, ET ALS., APPELLANTS,

vs.

LIZZIE W. CAREW, W. W. HAMPTON, E. R. GUNBY, ET ALS., APPELLEES.

BRIEF OF COUNSEL FOR APPELLEES.

EDWARD R. GUNBY,
HORATIO BISBEE,
Of Counsel for Appellees.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 13469

(18,966.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 52.

SALLIE FIELD SCOTT, ELIZA MADISON SCOTT, HARRIET B. JONES, FREEMAN JONES, LUCIA BEVERLY BERNARD, HUGH S. MORRISON, HACKLEY MORRISON, ELIZABETH MADISON MORRISON, MARIA HACKLEY, MARY HACKLEY, SALLIE HACKLEY, MARY F. HACKLEY, SALLIE STRACHAN HACKLEY, ALEXANDER S. HACKLEY, GERTRUDE HACKLEY, THOMAS H. HACKLEY, and STEPHEN P. HACKLEY

vs.

LIZZIE W. CAREW, W. W. HAMPTON, E. R. GUNBY, M. G. GIBBONS, M. M. NELSON, E. C. BEACH, S. Y. FINLEY, and GEORGE W. HALL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF EDWARD R. GUNBY AND HORATIO BISBEE, SOLICITORS FOR APPELLEES.

It appears by the bill of complaint filed in this case that the heirs of Robert J. Hackley, who died in 1845, claim the lands in controversy on the ground that their ancestor

acquired certain rights by virtue of a settlement of the said Robert J. Hackley on said lands in 1823, and that as a legal result of said settlement the said rights have descended to his heirs, the said Robert J. Hackley, during his lifetime, and his heirs and representatives since his death, having done everything to perfect the rights which descended to them.

There is no dispute about the legal title to this land, it appearing from the record that, after a contest which lasted for twelve years and went through the Land Department of the United States from the local office to the Secretary of the Interior, which was twice or three times reviewed and finally adjudicated by the Secretary of the Interior, the title of the United States, which was never disputed, passed by patent to the defendants and, as far as the rights of the complainants and the Government were concerned, the controversy was ended and the matter settled in favor of the defendants.

The record here shows that the Secretary of the Interior, Mr. Hoke Smith, decided adversely, as a matter of fact and as a matter of law, to the claims of the complainants, and subsequently to this decision, a petition having been filed by Beelbie *et al.*, claiming that the patents to these defendants were, by reason of false and fraudulent testimony and misrepresentations, illegally issued, the Government of the United States, through its duly recognized authority, the Secretary of the Interior, Cornelius N. Bliss, reviewed the entire case and refused on the part of the Government to bring a suit to annul the patents, giving as his reason for said decision that the Government was satisfied that the alleged frauds could not be proved.

The sole ground, then, upon which these complainants have any standing in a court of equity to ask its intervention for the purpose of obtaining any rights which they may seem to have is that the Secretary of the Interior, in his decision, came to an erroneous conclusion as to the application of the

law and its construction under and by virtue of which the Hackley heirs claim that they were entitled to the first right to pre-empt the land in controversy.

No fraud is charged in this bill; no subversion or perversion of facts or testimony; no illegal action on the part of the defendants; no information given to the Secretary of the Interior or the local land office which misled the legal officers and resulted in the obtaining of a patent for the present owners; no testimony which tended to influence the decision of the land officers improperly, and we therefore have the plain, bold, legal proposition that the Secretary of the Interior having erred in his construction of the law, and the patent by reason of such error having been issued to the wrong people, they, being the legal owners by reason of the patent, shall be deemed and held by this court to hold the land in trust for the benefit of the people who should have received the patent, the appellants in this case, and that therefore they, the appellees, be required to convey by proper deeds the lands so held by them.

The appellants were, on the face of their bill, at the time of the bringing of this suit, barred by the statute of limitations, and the appellants, if they ever had any rights, lost them by laches.

Statute of Limitations.

Sub. IV of section 1294 of the Revised Statutes of Florida reads as follows: "Within four (4) years an action for any article charged in a store account, and any action for relief not specifically provided for in this chapter." Sub. V of said section reads in part as follows: "Within three (3) years an action for relief on the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the fact constituting the fraud."

Our contention is that both the four-year and three-year clauses of the statute of limitations above quoted are a complete bar to this action. The bill shows on its face that patent was issued to defendant in July, 1896; the bill was not filed until December, 1900, or about four and one-half years after the patent issued.

A statute of limitations made expressly applicable to a suit in equity or barring a suit in equity is of comparatively modern origin both in England and America. At a more distant period there was no statute of limitations barring a suit in equity, but courts of equity, acting in analogy to the statute barring an action at law, invented and applied the doctrine of laches and stale claims.

Decided cases arising under these modern statutes of limitations are abundant to establish that both the three-year and four-year clauses of our statutes are an absolute bar to the suit. The said four-year clause was carried into the Revised Statutes from section XII of an act of 1872 by the Florida legislature, which section provides that "An action for relief, not hereinbefore provided for, must be commenced within four years after the cause of action accrued." The supreme court of Florida held that this section applied to an equity case and was a complete bar to any suit in equity not brought within four years.

Branch *vs.* Cole, 18th Fla., 368. Speaking on the same subject in Brown *vs.* Brown, 17th Fla., 623, at the bottom of the page, the court said that "If the case were not within the three-year clause it would be within the four-year clause of the statute," and in 24th Fla., 1, and 28th Fla., 55, the court held that "The statute of limitations applies to equity cases as well as to suits at law;" and the Supreme Court, in the case of The United States *vs.* Daniel, 12th Peters, p. 56, ruled that "In case a statute of limitations was applicable to an equity case, the court acted in obedience to the statute and not in analogy to it," whereas if there is no remedy at law and there is no statute of limitations that bars a suit in

equity, then the court acts in analogy to it. Courts of equity apply the bar in a case before it, if it would be the duty of the court at law to apply such a bar in the event there had been a remedy at law and a statute of limitations applicable thereto. This rule has no application to the case in hand, because there is a statute of limitations applicable to the case and bars the remedy in equity and there was no remedy at law. The case of Cleveland Insurance Company *vs.* Reid, 24th How., 284–287, is one of the earliest cases on the subject. There the statute of Wisconsin read substantially like the above four-year clause in Florida, and the court ruled that the statute of the State of Wisconsin was obligatory upon the Federal court. Other cases will be cited later on.

The Three-year Clause of Limitations.

This clause is applicable on the following grounds: The plaintiffs claim defendants have illegally obtained title to land that in equity should be conveyed to them, and the defendants refuse to convey. This is a statement of a legal fraud within the meaning of the statute of limitations. They knew of the alleged fraud the moment it was committed; they were parties to the litigation in the Interior Department, which the court judicially knows is conducted on formal pleadings, and they knew that the decision of that Department went against them; that a patent was ordered in 1894 and actually issued in July, 1896. We think there can be no question in reason, and certainly none on the authorities, that if A obtains a patent to land which equitably belongs to B and takes possession of and appropriates it and its rent and profits to his own use, he has committed an actual fraud. If A accomplishes such a result, not knowing that the land belongs to B, he has committed a legal fraud pure and simple. Second vol. of Wood on Limitations, sec. 274: Where the acts which constitute the fraud as

alleged in the bill were open and public acts, the statute commences to run from the time the defendant acquired the title. Norris *vs.* Haggin, 136 U. S., 386–392. In that case defendant acquired title under foreclosure of mortgage. *Ib.*, p. 391. In that case plaintiff at one time owned the legal title, and his remedy at law by ejectment would have been complete if he had seasonably resorted to it. In the case of St. Paul S. & T. F. R. R. Co. *vs.* Sage, the same doctrine was maintained. That case is on all fours with the case at bar. The land involved had been granted by the General Government to the State of Minnesota. Two rival railroad companies claimed title to it. The title was conveyed to one company and the other brought a bill in equity to compel the defendant to convey it. The clause in the Minnesota statute reads as follows: "6th. An action for relief on the ground of fraud. Cause of action in such case is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." Which is the exact language of the three-year clause of the Florida statute with the exception of the period of time. The circuit court of appeals held that the obtaining of the legal title to the land which equitably belongs to the defendants was a fraud within the meaning of the statute of limitations, and the suit, not having been brought within six years, was barred by the statute. (See op'n of the court, 1st C. C. A., p. 263.) This court would be bound to follow that decision unless some fault can be discovered in reasoning, which we think impossible. Of course, there can be no question that the proceedings in the Interior Department were public and notorious, and the plaintiffs, being parties to such proceedings, knew of the alleged fraud upon their rights when the decision was made against them in 1894, and also in the patent issued July, 1896.

The case of Teall *vs.* Schroder, 158th U. S., 172, was one like this at bar to compel the defendant to convey to the plaintiff the legal title. Suit was brought in California.

Justice Field, speaking for the court on page 178, quotes the statute of limitations as follows: "An action for relief not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued," and adds: "This section applies specifically to action for equitable relief." "Other sections of the act provide for the limitations of actions at law."

"Sub. IV., sec. 338 of the Code of Civil Procedure is as follows:" "An action for relief on the ground of fraud or mistake must be brought within four years after the cause of action accrues. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." In that, as in the case at bar, the facts showing the statute had run appeared on the face of the bill and were demurred to on that ground. The bill was dismissed because barred by the statute, and on appeal the decree of the court below was affirmed. (See op'ns, pp. 178, 179, 180.)

Case of Baker *vs.* Cummings, 169 U. S., 189, is fatal to the bill on demurrer.

The Doctrine of Laches.

A delay of over four years, during which the property involved has, in part, been sold, presumably to purchasers without notice of any plaintiff's claim, is fatal to a suit to set aside a judicial sale (156th U. S., 527–536). Indeed, the decision of the Interior Department was notice they had no claim. If fatal to set aside a judicial sale it is equally fatal to set aside a sale by the United States, and in 169th U. S., 189, the court held that the bill was not only barred by the statute of limitations of three years, but by laches (*Ib.*, 206). On the doctrine of laches we also cite 155th U. S., page 550; 158th U. S., 216–416; 160th U. S., 186; 156th U. S., 618.

In the case at bar the proceedings in the land office were

public, notorious acts, and the opinions and records of that office establish that plaintiffs were parties to all the proceedings resulting in a patent to the defendants. It was six years after the decision of that office was finally rendered against them before they brought this suit, and nearly four years and a half after patent issued.

Plaintiffs were bound to know that when the patent issued the title, by relation, dated from the initiatory filings in the Land Office, which were in 1882. They were also bound to know the law that as soon as the pre-emption claimants' rights or homestead claimants' rights were sustained and the purchase-money paid the property was the property of such claimants, subject to taxation and subject to contracts of sale, of improvements and incumbrances. They also knew that the lands in controversy were substantially a part of the city of Tampa, subject to rapid rise in value and to frequent alienations by deeds and other contracts, and that they would not remain in a state of nature.

Independent of the statute of limitations, if there ever was a cause to which the doctrine of laches or State claims is applicable, this is certainly one (Knox *vs.* Spratt, 23 Fla., 65–67).

Excuses for Delay.

The bill sets up, page 21, that one Beilby and others made an effort to get the Government to set aside the patent, and we suppose this averment was intended as an excuse for delay. Plainly it was not only no excuse, but reprehensible conduct on the plaintiffs' part. They knew perfectly well what the Supreme Court has repeatedly decided, that the Government never takes action to vacate a patent to land unless in a case where, if the patent is vacated, the land again becomes a part of the public domain. They knew that the Government never takes action to vacate a patent in the interest of and for the benefit of a private claimant.

Plaintiffs' willingness, then, that the title should be taken away from the patentees by action of the Government without any benefit resulting to them does not commend them to a court of equity. It is evidence of the harboring of a spirit of malice against the patentees for defeating plaintiffs in the Land Department.

An excuse for delay in bringing a suit which a court of equity recognizes consists of facts showing obstacles in the way of an early suit that could not, with reasonable diligence, have been overcome at an earlier date (12th vol. Pl. & Pr., 834–836).

Plaintiffs also suggest in their bill, as an excuse for a delay of their suit, the fact that the plaintiffs resided in the three States of California, New York, and Virginia, and to obtain concert of action by plaintiffs required time. But the answer to this suggestion is that the record shows the plaintiffs had already had concert of action before the Land Department in prosecuting this claim. Therefore the presumption is that each knew the address of the others, and in this day of railroads, telephones, and telegraphs one month would have been ample time to determine the question of concert of action. Besides, the absence of concert of action was not any legal impediment to a suit. Either one or more could have sued for their share of the property without joining the other claimants. Therefore what the bill states as excuses for delay would be dignified by calling them pretexts.

The suit is purely an experimental one, and not the less so because the plaintiffs have been able to employ reputable counsel to represent them. Its foundation is a mist of absurdities and uncertainties.

The plaintiffs, when the Land Department decided to award a patent to the patentees, to wit, in 1894, could have maintained a bill to enjoin such patentees from selling or incumbering the lands, and thus the patentees and third parties would have been notified of plaintiffs' alleged rights and

abstained from investing in the lands or improving the same (1st C. C. A., 269–270).

In that case counsel for complainants conceded that the innocent grantees from the patentees stand in a better position than the patentees themselves (*Ib.*, p. 260).

Contention of Plaintiffs.

The contention of plaintiffs that section 1288 of the Revised Statutes of Florida applies to this case is entitled to no weight. That section provides for cases where the action of defense is founded on legal title to real property and applies to an action of ejectment, and in such case the statute of limitations is seven years. As abundantly shown by authorities cited, this suit in equity is not an action founded upon title to real property, but to obtain a legal title on equitable grounds.

Another point: It may be contended that some of the plaintiffs are under disabilities, being minors or married women. The bill does not show that at the time the right of action accrued any of the plaintiffs were under disabilities, and the saving clause in the statute of limitations applies only to the person to whom the title first accrued, and when the statute once begins to run it continues to run (Wade *vs.* Doyle, 17th Fla., 522).

This is a familiar rule. But section 1294, sub. IV–V, already discussed, contains no exception on account of any disability, and it is a familiar rule that, where the statute of limitations makes no exception in favor of any person, either minor or married woman, the court of equity cannot engraft any exception upon the statute. We repeat, the bill does not show that any of the minors were in existence or that any of the married women were married women either at the time the patent was ordered, in 1894, or issued, in 1896. But a complete answer to any contention that any

of the plaintiffs were under disabilities is that the only section of the Revised Statutes of Florida providing for any disability is section 1292, and that applies specifically to persons entitled to commence an action for the recovery of real property or to make an entry or defense founded on the title to real property. In such cases there is a disability in favor of minors, insane and imprisoned persons, and none in favor of married women. This section, like section 1288, applies only to actions at law to recover real property based on legal title. Both sections are expressed in language so clear that there is no room for doubt on that subject. Under sections 1287 and 1288, if the action is founded on title to real property, it is not barred until the lapse of seven years; and section 1292 provides that if at the time the title to real property accrues the party to whom it accrues is within the age of twenty-one years, insane, or in prison, then the time such disability continues shall not be deemed any portion of the time in this chapter limited for the commencement of such action or the making of such entry or defense, but such action may be commenced within the period of seven years after such disability shall cease, etc.

The legislature having provided, by sections 1287 to 1293, inclusive, a system of statutory limitations in case of actions founded on legal title, it then proceeds, in article III, section 1294, to declare provisions applicable to sections other than real actions. The first clause of section 1294 reads as follows:

Limitations: "Actions other than those for the recovery of real property can only be commenced as follows," and declares the period of the statute in seven various actions other than to recover real property, and among the seven is the four-year and the three-year clauses. The provisions of the statute are so clear and plain that we deem the citation of authorities unnecessary. The contention of the plaintiffs that the seven years' limitation in section 1288 applies—that is, a court of equity can apply it, by way of analogy, if the

seven years had run before the suit commenced—would render the four-year clause and three-year clause applicable to action in equity for relief entirely nugatory and inoperative. In short, it is very plain that this bill in equity treating the defendants as trustees to compel them to convey the legal title cannot be tortured into an action for the recovery of real property, based upon the seisin or possession of the plaintiffs, their ancestors, predecessors, or grantors. This is clearly shown in the case of Branch *vs.* Cole, 18th Fla., 368, where the court declares in first syllabus as follows:

"A suit in equity claiming dower and mesne profits is not an action to recover real property, based upon the seisin or possession of the plaintiff," etc.

The court, in its opinion on page 375, considered section 2 of the act of 1872, which in its language is in legal effect the same as sections of Revised Statutes numbers 1287 and 1288, and, if a bill in equity to set aside dower and recover profits which is to determine the legal title to property is not an action to recover real property, certainly this bill to compel a conveyance of the title to real property and the recovery of profits is not an action for the recovery of real property.

Demurrer.

That the defense of the statute of limitations can be taken by demurrer where the facts showing the bar appear in the bill cannot be questioned (13th vol. Pl. & Pr., pp. 201, 206, and 101 U. S., 567).

Also "where plaintiffs claim disability to avoid statutory limitations, they must be shown in the bill" (15th vol. Pl. & Pr., pp. 257, 258, and notes.)

Paragraph 1.

The next point argued on the demurrer was that the settlement of Robert J. Hackley in 1823 and 1824, being admitted for the purpose of the argument, did not confer upon him any right or claim to pre-empt the land or any part thereof for the reason that his settlement, occupancy, and cultivation was not only without authority of law, but was in direct violation of the acts of Congress in force in the State of Florida at that time, viz., the act of March 3, 1807, which provides as follows: "That if any person or persons shall, after the passing of this act, take possession of or make settlement on any lands conceded or secured to the United States by any treaty made with a foreign nation or by a cession from any State to the United States, which lands shall not have been previously sold, conceded or leased by the United States, or the claim to which lands of such person or persons shall not have been previously recognized and affirmed by the United States; or if any person or persons shall cause such lands to be thus occupied, taken possession of, or settled, or shall survey or attempt to survey, or cause to be surveyed any such lands; or designate any boundaries thereon by marking trees or otherwise until thereunto duly authorized by law, such offender shall violate all his or their title, right and claim, if any he or they have, of whatsoever nature or kind the same may be, to the lands aforesaid which he or they shall have taken possession of or settled, or which he or they shall have surveyed or attempted to survey, or caused to be surveyed or the boundaries thereof he or they shall have designated or caused to be designated by marking trees or otherwise."

If the statement of the complainant's bill is true and R. J. Hackley was ejected from the said land by the military in 1824, any settlement he may have made, any improvements he may have erected, any cultivation he may have done,

any act of possession he may have comm itted, was contrary to law, and no right could have been initiated by virtue of any such illegal acts. This proposition standing alone would defeat the right of the Hackley heirs to recover in this case.

Paragraph 2.

The next proposition which we will present in this case is that the provisions of the act of 1826 could not apply to the land in question for the reason that at the time of its passage, and in fact for two years prior to the date of its passage, the land had been appropriated legally by the War Department of the United States for a military encampment or cantonment, and that, having been segregated from the public domain, it was no longer subject to pre-emption, it having been legally appropriated to the use of the army for public purposes. After the segregation of a body of public land from the general land of the United States and its appropriation to a specific purpose legally, no subsequent law, or proclamation, or sale, can be considered to embrace it or to operate upon it, even though no reservation of it has been made. In the case of Wilcox *vs.* Jackson, 13th Peters, page 498, it is held as follows:

"The President acts in many cases through the heads of departments, and the Secretary of War having directed a section of land to be reserved for military purposes, the court presumes it to have been done by direction of the President, and held it to be by law his act. Whenever a tract of land has been appropriated to public use, it is separated from the mass of the public domain, and subsequent laws of sale are not considered to embrace it, though they do not in terms except it."

In his decision on this case, Mr. Hoke Smith, the Secretary of the Interior, decided as one of the facts of the controversy as follows: "The tract now known as Fort Brooke

military reservation was occupied under the direction of the Secretary of War two years before the passage of the act upon which the claim of the Hackley heirs is predicated" (Record, page 48).

This statement of fact, taken together with the decision of the Supreme Court of the United States in the Wilcox *vs.* Jackson case, cited above, renders the conclusion inevitable that after the passage of the act of 1826 no right of pre-emption by virtue of its terms could exist as to lands prior to its passage appropriated for public purposes by the Secretary of War and severed from the mass of public lands subject to the operation of the law. We call the court's attention especially to the language of the act of 1826, namely:

"That every person, or the legal representative of any person, who being either the head of a family, or 21 years of age, did on or before the first day of January in the year one thousand eight hundred and twenty-five (1825), actually inhabit and cultivate a tract of land situate in the Territory of Florida (which tract is not rightfully claimed by any other person)." We contend, and it seems to us that the conclusion is inevitable, that the tract of land claimed in this controversy was at the time of the passage of the act of 1826 rightfully claimed by the Secretary of War as a military cantonment, and was by the language of the act itself exempt from the operation of the pre-emption law and no rights could be obtained in it by any individual under that law. The court will notice particularly that the language is "which tract is not rightfully claimed by any other person;" not "was" at the time of the settlement claimed by any other person, but at the time of the passage of the act not rightfully claimed by any other person; and we insist that the possession of the military authorities prior to the passage of the act of 1826 was the possession and the rightful possession of some other person who claimed the land for the purpose declared to be legal by the decision of the Secretary of the Interior, and which made it impossible for the

law to confer upon Mr. Hackley any right to pre-empt the same. This position was stated most clearly by the Secretary of the Interior in his opinion, and seems to us to be clearly the law of the case.

Bearing upon this question, we quote the language of Mr. Justice Field in the Yosemite Valley case, 15th Wallace, page 77. Speaking of the power of Congress to grant public lands for specific public purposes, notwithstanding the pre-emption rights of settlers upon such lands, the court said: "If such be the effect of mere settlement with a view to pre-emption, upon the power of Congress to grant the lands occupied to another party, it must operate equally to deprive Congress of the power to reserve such lands from sale for public uses of the United States, though needed for arsenals, fortifications, light-houses, hospitals, custom-houses, court-houses, or for any other of the numerous public purposes for which property is used by the Government. It would require very clear language in the acts of Congress before any intention thus to place the public lands of the United States beyond its control by the mere settlement of a party with a declared intention to purchase, could be attributed to its legislation." And this decision was rendered in a case which will be hereafter more fully referred to, in which it was declared "that under the pre-emption laws a party by a mere settlement upon the lands of the United States with a declared intention to obtain title to the same, does not thereby acquire such a vested interest in the premises as to deprive Congress of the power to divest it by a grant to another party."

Our next contention is that, under the facts set out in the bill of complaint and the exhibits thereto attached, even if we conceded, for the sake of argument only, that, at the time of the passage of the act of 1826, Hackley had obtained the right to pre-emption by virtue of his settlement prior to the occupation of the land by the War Department, even then he was divested of his rights by reason of the fact that he

utterly failed to comply with the conditions and regulations requisite to complete his pre-emption and purchase the land.

The second section of the act of 1813, April 22, contains the conditions, terms, restrictions, provisions, and requirements which are referred to in the act of February 5, 1826, viz: "That every person claiming a preference in becoming the purchaser of a tract of land by virtue of this act, shall make known his claim by delivering a notice in writing to the register of the land office for the district in which the land may lie, wherein he shall particularly designate the quarter section he claims, which notice the register shall file in his office on receiving 25 cents from the person delivering the same, and in every case where it shall appear to the satisfaction of the register and receiver of public monies of the land office, that any person who has delivered his notice of claim is entitled to preference in becoming the purchaser of a quarter section of land, such person so entitled shall have the right to enter the same with the register of the land office, reproducing his receipt from the receiver of public monies for at least one-twentieth part of the purchase-money, as in the case of other public lands sold at private sale; provided that all lands to be sold under this act shall be entered with the register at least two weeks before the time of the commencement of the public sales in the district wherein the land lies; and every person having the right of preference in becoming the purchaser of a tract of land who shall fail so to make his entry with the register within the time prescribed, his right shall be forfeited and the land by him claimed shall be offered at public sale with the other public lands in the district to which it belongs."

The bill of complaint shows that Robert J. Hackley in 1823 inhabited and cultivated a certain tract of land situate on the east side of the Hillsborough river, and that the land is now known as lots numbers eight, nine, and ten of section

24, township 29 south of range 18 east, in Hillsborough county, etc., and that in the month of February, 1824, he was evicted from said lands and possession of the same taken by Col. George M. Brooke as a cantonment or fort for the United States troops.

The complainant, by his bill, further shows that the land office was established in St. Augustine, Florida, in which district or jurisdiction the land in controversy was located, in 1828, and yet that no act of his claiming the right to pre-empt the land upon which he claimed settlement was made until some time in the year 1835, the land at that time being yet unsurveyed by the Government. The bill shows further that the cantonment or reservation by the War Department at that time was about 16 miles square, and that the notice filed by him in 1835 complied with none of the provisions and requirements of section 2 of the act of 1813, inasmuch as that law required that the notice in writing to be delivered to the register of the land office and filed there should particularly designate the "quarter section" the applicant claimed the right to pre-empt, which right, as decided by the courts, was nothing more than a priority of privilege to purchase the particular land described whenever the same should be surveyed, platted, and offered for sale under the laws of the United States. It is not even claimed by the bill of the complainants that any subdivisions or quarter section of land was at any time described by Mr. Hackley, as required by the law of 1813.

The complainants in the court below further alleged that in 1843 Hackley caused to be secured from the register of the land office in St. Augustine, Florida, a certified copy of the evidence formerly filed in that office in support of his claim to the right of pre-emption in the purchase of the land, and filed the same with the register of the land office at Newnansville, Florida, and we call the attention of the court to this notice, which nowhere describes the land except in

the following language: "The tract of land known as Cantonment Brooke, Bay of Tampa."

The bill sets out that Robert J. Hackley died in 1845, and we respectfully submit to the court that at that date he had done nothing which would give him the right of pre-emption under the act of 1826 and the conditions imposed by the act of 1813, already quoted.

Under part II of the brief of appellants in this case, under the heading of "The technical grounds of demurrer" and the second division thereof, the learned counsel for appellants take the position that the bill in this case specifically sets up with sufficient certainty the compliance by R. J. Hackley with all the requirements of law under the act of 1826 and the subsequent act under which he claims the right of pre emption, and that, therefore, a demurrer to this part of the bill is what they call a "speaking demurrer," and will not lie.

Calling attention again to the bill itself, as found in the record, on page 7, we beg to state that it does not specifically allege the compliance with the requirements of the act aforesaid except by implication, and the only allegation of compliance (which, if left alone, would be totally insufficient) is found in the affirmation in the bill: "Your complainants show that the said Robert J. Hackley and his representatives, your complainants, as aforesaid, have complied with all of the terms, restrictions, conditions, provisions and regulations of the said acts of April 22nd, 1826, and February 5th, 1813, *so far as they are applicable to this case.*" (Italics ours.)

Therefore we respectfully submit that the allegation is not positive and certain, and will be sufficient only in case the further statements as to what was done (which statements of fact are made a part of the bill) are sufficient to show a compliance with the requirements of these laws, and as the allegations of the bill as to what was actually done are, in our opinion, totally insufficient, then a demurrer will lie to this specification of the bill of complaint.

There is another reason, however, to which the attention of the court, as far as we have been able to notice and examine the briefs of the complainants, has not been called at all, and that is that the act of 1813, section 2, required that the pre-emption certificate of the lands to be sold to people who had delivered the proper notice under the act of 1826, describing the particular quarter section claimed, was to be entered with the register at least two weeks before the time of the commencement of the public sales in the "district" in which the land lies, and it is nowhere set up in the complainants' bill, nor is it a fact from the record, that the land in controversy was ever reported to the register and receiver by its description two weeks before the time of the commencement of public sales in the district wherein the land lay, at that time the St. Augustine district. As a matter of fact, public sales of the land in this district were first made in 1828, and were made from time to time by the officers of the Government, as required by law, and we contend that the failure of Mr. Hackley to make known his claim by delivering a notice in writing two weeks before the sales of the public lands in the district in which the land claimed by him was situated absolutely forfeited his right under the latter clause of section 2 of the act of 1813, which says: "Every person having the right of preference in becoming the purchaser of a tract of land, who shall fail so to make his entry with the register within the time prescribed, his right shall be forfeited and the land claimed by him shall be offered at public sale with the other public lands in the district to which it belongs." The reason why the land was not offered for public sale with the other public lands in the district to which it belonged is apparent; that prior to the act of 1826 it had been legally appropriated by the War Department for a cantonment, and therefore it was withdrawn from the mass of public lands of the United States, and was no more subject to sale than it was subject to the right of pre-emption at the time of the pas-

sage of that act; but for the purpose of the argument, if it had never been reserved, if it had still remained subject to the right of pre-emption, and the military cantonment of Fort Brooke had never been established on it, Mr. Hackley during his lifetime had not complied with the clear requirements of the act of 1826, coupled with the act of 1813, and had by his failure forfeited every right to pre-emption, and at the time of his death had no rights of preference in the purchase of this particular land. If Mr. Hackley had no vested interest by virtue of his settlement, then his heirs and representatives had nothing whatever upon which to base their claim of right to pre-emption.

The right of Congress to withdraw public lands, leaving no vested right in a mere settler prior to his completion of his right to an actual pre-emption of the land and the purchase of it, is decided most clearly and fully in the case of Frisbie *vs.* Whitney, 9th Wallace, page 187. In this case the court decided, in a very elaborate opinion by Mr. Justice Miller, that the mere occupation and improvement of the public lands with a view to pre-emption do not confer a vested right in the lands so occupied. The court decides, further, that the power of Congress over public lands is conferred by the Constitution, and can only be restrained by the courts in cases where the land has ceased to be Government property by reason of a right vested in some person or corporation; that such a vested right under the pre-emption laws is only obtained when the purchase-money has been paid and the receipt of the proper land officer has been given to the purchaser; that, until this is done, it is within the legal and constitutional competency of Congress to withdraw the land from entry or sale, even though this may defeat the imperfect right of the settler.

In the Yosemite Valley case, 15th Wallace, page 78, heretofore referred to on another branch of the argument, Mr. Justice Field quotes the case of Frisbie *vs.* Whitney and very clearly distinguishes both cases from that of Lytle against

the State of Arkansas, depended upon by the attorneys for the complainants in this case, as well as in that. In his opinion, after stating positively that the opinion of the Supreme Court in the case of Frisbie *vs.* Whitney was well considered, and unanimously the opinion of the court, Mr. Justice Field, in speaking of the case of Lytle against the State of Arkansas, states as follows: "The case of Lytle against the State of Arkansas is confessedly the strongest case which counsel can cite in support of the anomalous views advanced by him. It is manifest from the statement we have made of the facts in that case that neither the case itself nor the language used in the opinion of the court, when considered in connection with the facts, give the slightest countenance to those views, but that the decision of the court and the doctrines expressed in the opinion are entirely in harmony with the principles announced in Frisbie *vs.* Whitney. The whole difficulty in the argument of the defendant's counsel arises from his confounding the distinction made in all the cases, whenever necessary for their decision, between the acquisition by the settler of a legal right to the land occupied by him as against the owner, the United States, and the acquisition by him of a legal right as against other parties to be preferred in its purchase, when the United States have determined to sell. It seems to us little less than absurd to say that a settler or any other person by acquiring a right to be preferred in the purchase of property, provided a sale is made by the owner, thereby acquires a right to compel the owner to sell, or such an interest in the property as to deprive the owner of the power to control its disposition."

Referring to the facts in the above case, we call to the attention of the court that this is a case directly in point, where the land had been granted after the settlement by the claimant, and where the settlement by the claimant had been made and admitted after the passage of the act allowing the right of pre-emption, and in this particular it is even much stronger

in the interest of the claimant than the case at bar, the grant to the State having been made after an admitted legal occupation by the claimant, Mr. Hutchins. No vested interest was ever permitted to a pre-emptor of land until after the return of the survey of the land, by virtue of which survey he could comply with the requirements of the statute and enter with the register and receiver a description of the specific piece of land which he claimed the right to purchase, as a prior right over other purchasers or claimants.

In the case of Rector *vs.* Ashley, 6th Wallace, page 142, Mr. Justice Miller delivered another opinion upon the same subject, in which he says on page 151: "The rights of the claimant are to be measured by the act of Congress, and not exclusively by what he may or may not be able to do, and if a sound construction of that act shows that he acquires no vested interest in the land until the officers of the Government have surveyed the land, until that survey is filed in the office of the recorder and approved by him, then so the claimant's rights are created by that statute they must be governed by its provisions, whether they be hard or lenient."

In the case of Hall against Russell, 11th Otto, page 303, Chief Justice Waite delivered the opinion of the court, and decided that the title to the sale does not vest in the settler until the conditions have been fully performed. The opinion in this case is very elaborate and decides positively that there is no vested interest until the requirements of the statute have been fully complied with.

The last case on this subject, and one which seems to cover the entire ground of the controversy, is the case of Buxton *et al. vs.* Traver *et al.*, 130th United States, page 232. In this case Mr. Justice Field reaffirmed the doctrine, which he said had long been established in this court, laid down in Frisbie *vs.* Whitney, and quotes the opinion of Mr. Justice Miller, as well as the opinion of the court, in the Yosemite Valley case, hereinbefore referred to.

It seems to us that this unbroken line of decisions establishes the law beyond the possibility of controversy; that under the facts in this case found by the Secretary of the Interior Robert J. Hackley, during his lifetime, obtained no vested interest by virtue of his settlement. The very elaborate argument and proof prepared by the learned attorneys for the complainant changes by not one whit the well-settled law that the mere settlement upon public lands by one who desires to obtain the prior right of purchase from the Government carries with it no vested right in the land settled upon, and the only way that the settler can obtain any such right is after the lands are surveyed (if the settlement has been made prior to a survey), and to strictly comply with the statutes of the United States in force at the time in order to complete the purchase of the land which he claims he has a right to purchase in preference to others, and it in no way affects the right of the United States to dispose of the land either by grant, by gift, or by reservation before such public sale is ever permitted to take place.

As to Vested Rights and Decisions.

The position contended for by the solicitors for the appellants, both in the court below and here, is that the decisions of the Supreme Court beginning with Rector *vs.* Ashley, in 6th Peters, are not applicable to and do not govern the case at bar, because they arose under the pre-emption law of 1841, and this law was the first general pre-emption act, and enunciated and instituted a new order of things in the policy of the United States in the disposition of public lands.

They boldly take the position that old methods ceased, new methods began, conditions precedent, which gave vested rights, gave way to the performance of conditions subsequent which must be performed, or no right to the settler accrued.

The first case cited from the Supreme Court decisions was that of Rector *vs.* Ashley, 6 Wall., 142, and arose not under the general pre-emption law of 1841, but was a construction of a special act passed in 1836.

Following this case is that of Frisbie *vs.* Whitney, 9 Wall., 187, in which the court again sustains the principle laid down in Rector *vs.* Ashley as to what is necessary in order to have a vested right in the public lands of the United States.

In the Yosemite Valley case decided in 1872, Mr. Justice Field reaffirms the law as laid down in Frisbie *vs.* Whitney, and does not stop there, but carefully distinguishes the case of Lytle *vs.* Arkansas.

In Buxton *et al. vs.* Traver *et al.*, 101 U. S., 232, the court again passed on the question of vested rights, and again reaffirmed and quoted the decisions in the two cases last herein referred to.

We now come to the question of the "New Era," spoken of in appellant's brief, beginning in 1841.

It is true that the act of 1841 extended and enlarged the privileges of pre-emptors. It made changes in the policy of the Government, in that it permitted aliens to declare their intention and secure land, and people who should in future comply with the law to become the beneficiaries of the richest and most generous Government in the world—the richest in wonderfully fertile soil, the most profligate in giving it away. That part of the act necessary to be considered reads as follows:

Act of Congress, 1841; 5th Statutes at Large, chapter 16.

> "SEC. 10. *And be it further enacted*, That from and after the passage of this act, every person being the head of a family, or widow, or single man, over the age of twenty-one years, and being a citizen of the United States, or having filed his declaration of intention to become a citizen, as required by the naturalization laws, who since the first day of June, A. D.

> eighteen hundred and forty, has made or shall hereafter make a settlement in person on the public lands to which the Indian title had been at the time of such settlement extinguished, and which has been, or shall have been, surveyed prior thereto, and who shall inhabit and improve the same, and who has or shall erect a dwelling thereon, shall be, and is hereby, authorized to enter with the register of the land office for the district in which such land may lie, by legal sub-divisions, any number of acres not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land, subject, however, to the following limitations and exceptions."

This act did not confine its benefits to those who should, after the passage of it, make settlement, but, like all the acts passed under the "Old Era," recognized prior settlement and prior improvements. It made no new departure, except to induce new settlers to take up our lands and build up our prairies. Under the provisions of the act of 1841, every man who had prior to the date of its passage and subsequent to the first day of June, 1840, made settlement, or erected a dwelling, was entitled to the first right to buy, and occupied the same legal position with the same vested rights Hackley had under the law of 1826. If this is true, and the mere fact of prior settlement and cultivation under the law changed the position of the entryman from being the beneficiary to that of benefactor, that instead of having a privilege he owned a right—then the decisions of the Supreme Court already referred to by us must control the case, and all the voluminous argument and history of the land laws to show the dawning of a "New Era" in 1841 must fail. It is true that the act of 1841 applied only to surveyed lands, so also did the acts of 1826 and of 1830, although the words "surveyed land" did not appear in the acts. All pre-emption laws have applied to surveyed lands.

The first general pre-emption act was passed in 1830, May 29, chapter 208, and permitted settlers to pre-empt on certain conditions 160 acres of the public domain. Section 1 reads as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That every settler or occupant of the public lands, prior to the passage of this act, who is now in possession, and cultivated any part thereof in the year one thousand eight hundred and twenty-nine, shall be, and he is hereby, authorized to enter, with the register of the land office, for the district in which such lands may lie, by legal sub-divisions, any number of acres, not more than one hundred and sixty or a quarter section, to include his improvement, upon paying to the United States the then minimum price of said land; provided, however, that no entry or sale of any land shall be made, under the provisions of this act, which shall have been reserved for the use of the United States, or either of the several States, in which any of the public lands may be situated."

The court will note that the land was to be entered according to its legal subdivisions, and this implied a survey. If there is any doubt, however, it must be dispelled by reading the first section of the act of Congress, July 14, 1832, as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all the occupants and settlers upon the public lands of the United States, who are entitled to a pre-emption according to the provisions of the act of Congress, approved the twenty-ninth day of May, eighteen hundred and thirty, and who have not been, or shall not be, enabled to make proof and enter the same within the time limited in said act, in consequence of the public surveys not having been made and returned, or where the land was not attached to any land district, or where the land has been reserved from sale on account of a disputed boundary between

any State and Territory, the said occupants shall be permitted to enter the said lands on the same conditions, in every respect, as are prescribed in said act, within one year after the surveys are made, or the land attached to a land district, or the boundary line established; and, if the said lands shall be proclaimed for sale before the expiration of one year as aforesaid, then they shall be entered before the sale thereof."

And the act of March 2, 1833, which reads as follows:

"Chap. XCII.—An act to revive the act entitled, 'An act supplementary to the several laws for the sale of (the) public lands.'

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in all cases in which persons were settlers or occupants of the public lands prior to the first day of May, one thousand eight hundred and thirty-two, and were authorized to enter under the provisions of the act, entitled, 'An act supplementary to the several laws for the sale of (the) public lands,' approved April fifth, one thousand eight hundred and thirty-two, and were prevented from making their entries, in consequence of the public surveys not having been made and returned, or where the land was not attached to any land district, or where the same has been reserved from sale in consequence of a disputed boundary between two States, or between a State and Territory, the said occupants shall be permitted to enter the said lands on the same conditions, in every respect, as were prescribed in said act, within one year after the surveys are made, or the land attached to a land district, or the boundary line established; and if the land shall be proclaimed for sale before the expiration of one year as aforesaid, then the said settlers or occupants shall be permitted to enter before the sale thereof."

The land in controversy was, as a matter of fact, relinquished by the Government on the 4th day of June, 1883, and restored to the public domain under the land laws in

force at that time, and became a part of the public domain, subject to the operation of such laws, and the map and plat of it was duly filed in 1883, March the 22d.

The only application which was ever made by the heirs or representatives of Hackley was made, as set out in the bill, by the administrator in 1887, on October the 14th. At this time the land in controversy had been surveyed, platted, and the plats filed in the land office at Gainesville, Florida, nearly four years. Section 2286 of the Revised Statutes, being part of the act of 1862, requires or required at that time, the same being in force, that, in regard to settlements which were authorized upon unsurveyed lands, the pre-emption claimant shall in all cases be required to file his declaratory statement within three months from the date of the receipt at the district land office of the approved plat of the township embracing such pre-emption settlement. If, then, the right to pre-empt accrued to Hackley by virtue of his settlement in 1823, and the lands upon which he settled were never surveyed until 1883, and his representatives had a right, never having abandoned or forfeited during his lifetime his right to pre-empt, to complete that pre-emption, they could only do so, we submit, by strictly following the methods in force at the time of the survey to perfect their title, and they should have within three months after the filing of the plat, in 1883, made their declaratory statement under section 2266, Revised Statutes; this they do not claim to have done. There seems to be no question raised in the bill as to the legality of the occupation of the lands in controversy, under the order of the Secretary of War, by General Brooke in 1824, nor does there seem to be any controversy as to the fact decided by the Secretary of the Interior that this military reservation was legally abandoned on the 4th day of June, 1883.

These facts being, for the purpose of the argument, admitted, then the land in controversy immediately became a part of the public domain, subject to be disposed of under

the law as it existed on March the 22d, 1883. The law in force at that time with reference to military reservations in Florida was the act of August 18, 1856, and this act provided "that all lands heretofore reserved for military purposes in the State of Florida, etc., shall be disposed of and sold in the same manner and under the same regulations as other public lands of the United States."

After the abandonment or relinquishment of the reservation by order of January 4, 1883, a private diagram of the subdivisions of the land in controversy was received and approved by the local officers at Gainesville, Florida, and the reservation of Fort Brooke no more existed, the lands being restored to the public domain by virtue of the act of 1856, just quoted. If this is true, as found by the Secretary of the Interior, Mr. Hoke Smith, then the act of 1884, providing for the disposition of useless military reservations, could have no application to the land in controversy, as there was no useless military reservation known as Fort Brooke to which it could be applied. Fort Brooke had been abandoned in 1883 and the land restored to the public domain under the law then in force. The act of 1884 could have and did have no effect upon it.

The courts of the United States have always held that, while the interpretation placed upon the public-land acts by the Secretaries of the Interior is not binding upon the courts as matters of law, the decisions by the Secretary are binding as to facts, and that his findings will not be reviewed by a court of equity.

U. S. *vs.* Murphy, 32 Fed., page 376.
Lee *vs.* Johnson, 116 U. S., page 48.
Scott *vs.* Lockey Inv. Co., 60 Fed., page 34.

It is true that, in some cases, the courts of the United States will intervene to correct mistakes of law made by officers of the Land Office, but the rule is that they will do so only when it is clear that these officers have, by a mistake

of law, given to one man the land which, on the undisputed facts, belongs to another. The rule goes further; in the language of Justice Miller, "This means, and it is a sound principle, that where there is a mixed question of law and fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive."

Marquez *vs.* Frisbie, 11 Otto, 477.

Counsel for the appellants devote considerable of their time and brief to the facts as found by the land officers (Appellants' Brief, p. 152 *et seq.*).

We submit that the findings of fact to be considered by this court are confined to the opinion of the Secretary of the Interior, by virtue of which the appellees obtained their title, not the findings of registers, receivers, and commissioners that have failed to be sustained. The decision of Secretary Smith, which is the only decision that this court can be asked to review, it being the opinion and decision in which the error of law is alleged to have injured the appellants, does not admit of any question. He says, and finds as a fact, as follows, on bottom of page 54 of this record: "The tract now known as the Fort Brooke military reservation was occupied, under the direction of the Secretary of War, two years before the passage of the act upon which the claim of the Hackley heirs is predicated." Is this a statement of law or of fact? If it is a mistake, is it a mistake of fact or of law? If it is a finding of facts, then the case of Wilcox *vs.* Jackson (13th Peters, 498) supplies the law applicable to it and settles the case in this court.

Even should it be proper in this connection to consider the opinion of Secretary Noble, from which the learned counsel for appellants quote in their brief, on page 154, the findings of fact therein contained are insufficient to show a compliance with the statutes, because Mr. Secretary Noble does not find as a fact that they complied with the require-

ments of the act of 1813 and the act of 1826, under which they claim, but, on the contrary, the bill itself alleges, in effect, their failure to comply with the requirements of these statutes and proceeds to make excuses for their failure so to comply.

The next question is the standing of the grantees of the defendants to whom the defendant Lizzie W. Carew and the other grantees by patent of the United States had sold and deeded lots after the grant of the United States and without any charge of fraud or collusion. It is true the bill sets up in a weak and unsatisfactory way that these grantees had some sort of notice of the rights of the complainants, but they do not set up sufficiently, and even if they had notice they would be *bona fide* purchasers, entitled to be dismissed with their purchases from this court, unless they were actual participants in a fraud, which is nowhere charged in complainants' bill.

The Secretary of the Interior on March 8, 1898, refused to enter suit on the part of the United States, and at the petition and request of various squatters on these lands for the cancellation of these patents, on the ground that much of the land had been conveyed to purchasers, and that these people, if they were not parties to the fraud, would be *bona fide* purchasers, innocent in the eyes of the Government, and their rights would not be affected by a setting aside of the patents.

Surely, the only notice that could have been given of the right of the Hackley heirs was the notice that had appeared throughout the entire record of this case from 1883 up to the time of the issuance of the patents. They had been represented in every forum by eminent legal counsel; their rights had been adjudicated by the highest officer of the Land Office at least twice, and the Government had decided that there was no law which gave them the right of preemption, and that, even were the law which they claimed the benefit of applicable, they had utterly failed to comply

with the terms and provisions of it. Mrs. Carew and the other grantees from the Government had an absolute, indefeasible title from the highest possible source, and any purchaser from them by deed was, as to all the parties to the controversy, without notice except that notice of record to which we have already referred—that notice which said to them in plain language that the rights of the Hackley heirs had been adjudicated by a court of competent jurisdiction, and the case had been decided against them.

If the allegations of the complainants' bill are correct as to the dates upon which the various defendants other than Mrs. Carew received from or through her conveyance to the various pieces of property for the parts of the land allotted to her by the final decision of the Secretary of the Interior, then it is immaterial for the purposes of this argument whether the consideration for these various deeds was *bona fide* or not, inasmuch as nobody but Mrs. Carew or her creditors could raise that question. The Hackley heirs are in no position to raise it, because, from the date of the final receipt from the register and receiver of the general land office in Florida to the date of the bringing of this suit in the circuit court of the southern district of Florida, to wit, from the — day of —— to the 31st day of December, 1900, every purchaser of any of this property from Lizzie W. Carew must have been, under the allegations of this bill, an innocent purchaser without notice, because no purchaser could be deemed to have notice of an erroneous construction of law by an officer with proper jurisdiction or of a trust which did not and could not appear of record and which can never exist until it exists by a decree of court under the proceeding in equity which was begun long subsequent to the date of their deeds.

The twelfth ground of demurrer is that there is no specific allegation of error or construction of law in complainants' bill, and that unless such allegation is specifically made the bill should be dismissed. It is true that the complainants set

up in their bill that they come into court to claim a construction of the laws of the United States, and upon this statement and a quotation of the land laws of the United States, which they desire to be construed, they pray the jurisdiction of this honorable court; but this is not enough; they must show on the face of their bill, first, that there was a distinct error of law, and, second, that by that error alone they were deprived of rights which a proper construction of the statute itself would give them. This they have not done.

EDWARD R. GUNBY,
H. BISBEE,
Solicitors for Appellees.

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Supreme Court

OF THE

United States.

October Term, 1904.

No. 52.

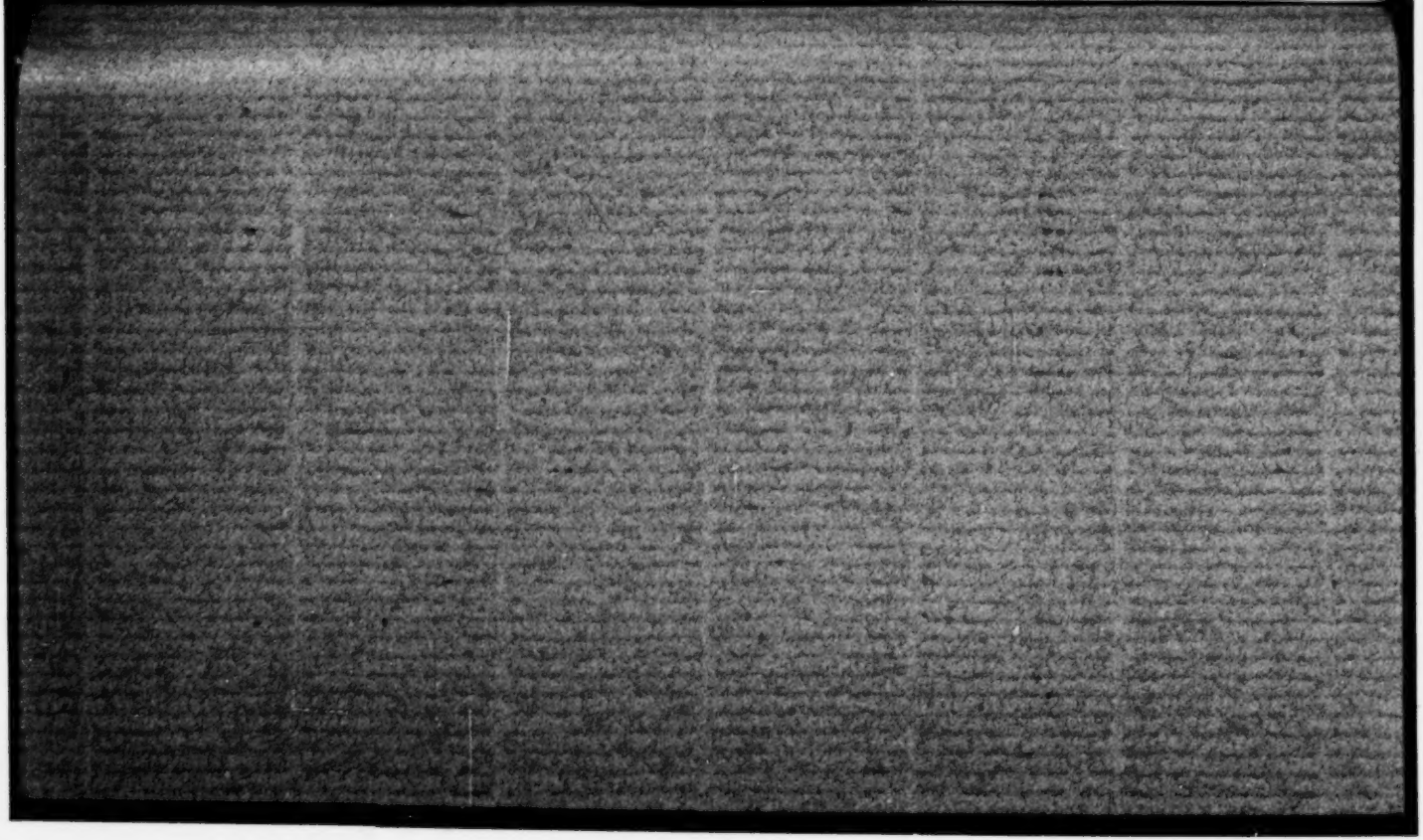
SALLIE FIELD SCOTT et al.,
Appellants,

vs

LIZZIE W. CAREW et al.,
Appellees.

BRIEF FOR APPELLEES.

1904.
Press of The H. & W. B. Drew Company,
Jacksonville, Fla.



STATUTE OF LIMITATIONS.

Upon the facts stated in the bill, the suit is barred by the Statute of Limitations; and the laches of appellants constitute a complete defense.

Sub. IV of Section 1294 of the Revised Statutes of Florida reads as follows: "Within four (4) years, an action for any article charged in a store account, and any action for relief not specifically provided for in this chapter." Sub. V of said section reads in part as follows: "Within three (3) years an action for relief on the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the fact constituting the fraud."

Our contention is that both the four year and three year clauses of the statute of limitations, above quoted, are a complete bar to this action. The bill shows on its face that patent was issued to defendant in July, 1896; the bill was not filed until December, 1900, or about four and one-half years after the patent issued.

A statute of limitations, made expressly applicable to a suit in equity or barring a suit in equity, is of comparatively modern origin both in England and America. At a more distant period, there was no statute of limitations barring a suit in equity, but Courts of Equity, acting in analogy to the statute barring an action at law, invented and applied the doctrine of laches and stale claims.

Decided cases, arising under these modern statutes of limitations, are abundant to establish that both the three year and four years clauses of our statutes are an absolute bar to the suit. The said four year clause was carried into the Revised Statutes from Section XII of an Act of 1872 by the Florida Legislature, which section provides that, "An action for relief, not hereinbefore provided for, must be commenced within four years after the cause of action accrued." The Supreme Court of

Florida held that this section applied to an equity case and was a complete bar to any suit in equity, not brought within four years.

Branch vs. Cole, 18th Fla., p. 368. Speaking on the same subject in Brown vs. Brown, 17th Fla. 623, at the bottom of the page, the Court said that, "If the case were not within the three year clause, it would be within the four year clause of the statute," and, in 24th Fla., p. 1, and 28th Fla. 55, the Court held that "the statute of limitations applies to equity cases as well as to suits at law." And the Supreme Court, in the case of the United States vs. Daniel, 12th Peters, p. 56, ruled that, "In case a statute of limitations was applicable to an equity case, the Court acted in obedience to the statute and not in analogy to it;" whereas, if there is no remedy at law and there is no statute of limitations that bars a suit in equity, then the Court acts in analogy to it. Courts of Equity apply the bar in a case before it, if it would be the duty of the Court at Law to apply such a bar in the event there had been a remedy at law and a statute of limitations applicable thereto. This rule has no application to the case in hand, because there is a statute of limitations applicable to the case and bars the remedy in equity and there was no remedy at law. The case of Cleveland Insurance Company vs. Reid, 24th How. 284-287, is one of the earliest cases on the subject. There, the Statute of Wisconsin read substantially like the above four year clause in Florida, and the Court ruled that the Statute of the State of Wisconsin was obligatory upon the Federal Court. Other cases will be cited later on.

THE THREE YEAR CLAUSE OF LIMITATIONS.

This clause is applicable on the following grounds: The plaintiffs claim defendants have illegally obtained title to land that in equity should be conveyed to them and the defendants refuse to convey. This is a statement of a legal fraud within the meaning of the statute of limitations. They knew of the alleged fraud the moment

it was committed; they were parties to the litigation in the Interior Department, which the Court judicially knows is conducted on formal pleadings, and they knew that the decision of that Department went against them; that a patent was ordered in '94 and actually issued in July, '96. We think there can be no question in reason, and certainly none on the authorities, that if A. obtains a patent to land which equitably belongs to B., and takes possession of and appropriates it and its rent and profits to his own use, he has committed an actual fraud. If A. accomplishes such a result, not knowing that the land belongs to B., he has committed a legal fraud pure and simple. 2d Vol. of Wood on Limitations, Sec. 274: "Where the action which constitutes the fraud as alleged in the bill were open and public acts, the statute commences to run from the time the defendant acquired the title. Norris vs. Haggin, 136 U. S. 386-392. In that case, defendant acquired title under foreclosure of mortgage. Ib., p. 391. In that case, plaintiff at one time owned the legal title, and his remedy at law by ejectment would have been complete if he had seasonably resorted to it. In the case of St. Paul S. & T. F. R. R. Co. vs. Sage, the same doctrine was maintained. That case is on all fours with the case at bar. The land involved had been granted by the General Government to the State of Minnesota. Two rival railroad companies claimed title to it. The title was conveyed to one company and the other brought a bill in equity to compel the defendant to convey it. The clause in the Minnesota Statute reads as follows: "6th—An action for relief on the ground of fraud. Cause of action in such case is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." Which is the exact language of the three year clause of the Florida Statute with the exception of the period of time. The Circuit Court of Appeals held that the obtaining of the legal title to the land which equitably belongs to the defendants was a fraud within the meaning of the statute of limitations, and the suit, not having been brought within six years,

was barred by the statute. See Opn. of the Court, 1st C. C. A., p. 263. This Court would be bound to follow that decision unless some fault can be discovered in reasoning, which we think impossible. Of course, there can be no question that the proceedings in the Interior Department were public and notorious, and the plaintiffs being parties to such proceedings, knew of the alleged fraud upon their rights when the decision was made against them in '94 and also in the patent issued July, '96.

The case of Teall vs. Schroder, 158th U. S. 172, was one like this at bar to compel the defendants to convey to the plaintiff the legal title. Suit was brought in California. Justice Fields, speaking for the Court on page 178, quotes the statutes of limitations as follows: "An action for relief not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued," and adds, "This section applies specifically to action for equitable relief." "Other sections of the act provide for the limitations of actions at law."

"Sub. IV, Sec. 338 of the Court of Civil Procedure is as follows:" "An action for relief on the ground of fraud or mistake must be brought within four years after the cause of action accrues. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." In that, as in the case at bar, the facts showing the statute had run appeared on the face of the bill and was demurred to on that ground. The bill was dismissed because barred by the statute and on appeal of decree of the Court below was affirmed. See Opns., pp. 178, 179, 180.

Case of Baker vs. Cummings, 169 U. S. 189, is fatal to the bill on demurrer.

THE DOCTRINE OF LACHES.

A delay of over four years, during which the property involved has, in part, been sold, presumably to purchasers without notice of any plaintiff's claim, is fatal to a suit

to set aside a judicial sale. 156th U. S. 527-536. Indeed, the decision of the Interior Department was notice they had no claim. If fatal to set aside a judicial sale, it is equally fatal to set aside a sale by the United States, and in 169th U. S. 189, the Court held that the bill was not only barred by the statute of limitations of three years but by laches. Ib. 206. On the doctrine of laches, we also cite 155th U. S., p. 550; 158th U. S. 216-416; 160th U. S. 186; 156th U. S. 618.

In the case at bar, the proceedings in the land office were public, notorious acts, and the opinions and records of that office establishes that plaintiffs were parties to all the proceedings resulting in a patent to the defendants. It was six years after the decision of that office was finally rendered against them, before they brought this suit, and nearly four years and a half after patent issued.

Plaintiffs were bound to know that, when the patent issued; the title, by relation, dated from the initiatory filings in the land office, which were in 1882. They were also bound to know the law, that, as soon as the pre-emption claimants' rights or homestead claimants' rights were sustained, and the purchase money paid, the property was the property of such claimants, subject to taxation, and subject to contracts of sale, of improvements and incumbrances. They also knew that the lands in controversy were substantially a part of the City of Tampa, subject to rapid rise in value, and to frequent alienations, by deeds and other contracts, and that they would not remain in a state of nature.

Independent of the statute of limitations, if there ever was a cause to which the doctrine of laches, or state claim, is applicable, this is certainly one. Knox vs. Spratt, 23 Fla. 65-67.

EXCUSES FOR DELAY.

The bill sets up, p. 21, that one Beilby and others made an effort to get the Government to set aside the patent, and we suppose this averment was intended as an

excuse for delay. Plainly, it was not only no excuse, but reprehensible conduct on the plaintiffs' part. They knew perfectly well what the Supreme Court has repeatedly decided, that the Government never takes action to vacate a patent to land, unless in a case where, if the patent is vacated, the land again becomes a part of the public domain. They knew that the Government never takes action to vacate a patent in the interest of and for the benefit of a private claimant. Plaintiffs' willingness, then, that the title should be taken away from the patentees by action of the Government, without any benefit resulting to them, does not commend them to a Court of Equity. It is evidence of the harboring of a spirit of malice against the patentees for defeating plaintiffs in the Land Department.

An excuse for delay in bringing a suit which a Court of Equity recognizes consists of facts, showing obstacles in the way of an early suit that could not, with reasonable diligence, have been overcome at an earlier date. 12th Vol. Pl. & Pr., 834-836.

Plaintiffs also suggest in their bill, as an excuse for a delay of their suit, the fact that the plaintiffs resided in the three States of California, New York and Virginia, and to obtain concert of action by plaintiffs required time. But the answer to this suggestion is that the record shows the plaintiffs had already had concert of action before Land Department in prosecuting this claim. Therefore, the presumption is that each knew the address of the others and in this day of railroads, telephones and telegraphs, one month would have been ample time to determine the question of concert of action. Besides, the absence of concert of action was not any legal impediment to a suit. Either one or more could have sued for their share of the property, without joining the other claimants. Therefore, what the bill states as excuses for delay would be dignified by calling them pretexts.

The suit is purely an experimental one and not the less so because the plaintiffs have been able to employ reputable counsel to represent them. Its foundation is a

mist of absurdities and uncertainties.

The plaintiffs, when the Land Department decided to award a patent to the patentees, to-wit: in 1894, could have maintained a bill to enjoin such patentees from selling or incumbering the lands, and thus the patentees and third parties would have been notified of plaintiffs' alleged rights and abstained from investing in the lands, *or improving the same.* 1st C. C. A., 269-270.

In that case, counsel for complainants conceded that the innocent grantees from the patentees stand in a better position than the patentees themselves. Ib., p. 260.

CONTENTION OF PLAINTIFFS.

The contention of plaintiffs, that Section 1288 of the Revised Statutes of Florida applies to this case is entitled to no weight. That section provides for cases where the action of defense is founded on legal title to real property and applies to an action of ejectment; and in such case the statute of limitations is seven years. As abundantly shown by authorities cited, this suit in equity is not an action founded upon title to real property, but to obtain a legal title on equitable grounds.

Another point: It may be contended that some of the plaintiffs are under disabilities, being minors or married women. The bill does not show that, at the time the right of action accrued, any of the plaintiffs were under disabilities, and the saving clause in the statute of limitations applies only to the person to whom the title first accrued and, when the statute once begins to run, it continues to run. Wade vs. Doyle, 17th Fla. 522.

This is a familiar rule. But Sec. 1294, Sub. IV-V, already discussed, contains no exception on account of any disability, and it is a familiar rule that, where the statute of limitations makes no exception in favor of any person, either minor or married woman, the Court of Equity cannot engraft any exception upon the statute. We repeat, the bill does not show that any of the minors were in existence, or that any of the married women were

married women, either at the time the patent was ordered in 1894 or issued in 1896. But a complete answer to any contention that any of the plaintiffs were under disabilities is that the only section of the Revised Statutes of Florida providing for any disability in Section 1292, and that applies specifically to persons entitled to commence an action for the recovery of real property or to make an entry or defense founded on the title to real property. In such cases, there is a disability in favor of minors, insane and imprisoned persons, and none in favor of married women. This section, like Section 1288, applies only to actions at law to recover real property, based on legal title. Both sections are expressed in language so clear that there is no room for doubt on that subject. Under Sections 1287 and 1288, if the action is founded on title to real property, it is not barred until the lapse of seven years; and Section 1292 provides that, if at the time the title to real property accrues the party to whom it accrues is within the age of twenty-one years, insane or in prison, then the time such disability continues shall not be deemed any portion of the time in this chapter limited for the commencement of such action or the making of such entry or defense, but such action may be commenced within the period of seven years after such disability shall cease, etc.

The Legislature having provided by Sections 1287 to 1293, inclusive, a system of statutory limitations in case of actions founded on legal title, it then proceeds in Art. III, Sec. 1294, to declare provisions applicable to actions other than real actions. The first clause of Section 1294 reads as follows:

Limitations: "Actions other than those for the recovery of real property can only be commenced as follows," and declares the period of the statute in seven various actions other than to recover real property, and among the seven is the four year and the three year clause. The provisions of the statute are so clear and plain that we deem the citation of authorities unnecessary. The contention of the plaintiffs that the seven years limitation

in Section 1288 applies, that is, a Court of Equity can apply it, by way of analogy, if the seven years had run before the suit commenced, would render the four year clause and three year clause applicable to action in equity for relief, entirely nugatory and inoperative. In short, it is very plain that this bill in equity treating the defendants as trustees to compel them to convey the legal title, cannot be tortured into an action for the recovery of real property, based upon the seisin or possession of the plaintiffs, their ancestors, predecessors or grantors. This is clearly shown in the case of Branch vs. Cole, 18th Fla. 368, where the Court declares in first syllabus as follows:

"A suit in equity claiming dower and mesne profits is not an action to recover real property, based upon the seisin or possession of the plaintiff," etc.

The Court in its opinion on page 375, considered Section 2d of the Act of 1872, which in its language is in legal effect the same as sections of Revised Statutes number 1287 and 1288, and, if a bill in equity to set aside dower and recover profits which is to determine the legal title to property is not an action to recover real property, certainly this bill to compel a conveyance of the title to real property and the recovery of profits is not an action for the recovery of real property.

JOINDER OF PARTIES, SOME BARRED AND SOME NOT.

Plaintiffs suggest in their brief that some of the plaintiffs are the next friend of infants.

By a statute in Florida, an infant can sue by a next friend. We have not examined the point, but we suggest it is doubtful that the Florida statute applies. If not, then infants in an equity cause in the Federal Court can only sue by a lawfully appointed guardian.

It is also suggested that the next friends of infants can maintain the suit, even though all of the other plaintiffs are barred by laches or the statute of limita-

tions.

But the answer to this is that the doctrine of laches applies to guardians and next friends as well as the other plaintiffs.

The further answer is, all the plaintiffs sue jointly, and pray for one decree for a conveyance of the property to all jointly as tenants in common.

In such case, it has been a long established rule, that where the plaintiff sues jointly and one is barred all are barred.

Davis vs. Coblens, 174 U. S. 719, and cases cited.

ON THE MERITS.

FIRST POINT.

The proposition on which relief is based, is that the Secretary committed an error of law on his finding of facts, to plaintiffs' prejudice.

The substantial findings of fact, admitted in the bill are:

(a) That Hackley made a settlement in November or December, 1823, and remained in possession to February 1st, 1824.

(b) That Col. Brooke took possession, and appropriated the land to Government uses February 1st, 1824.

(c) That neither Hackley nor his heirs have ever been in possession since the land was so appropriated to Government uses.

(d) That the Government continued to occupy and held possession for military purposes until 1882—a period of fifty-eight years.

(e) That Hackley's heirs made no attempt to acquire the right of possession, under the Act of 1884, until Carew had been in lawful possession as homestead entry man for nearly five years, and made improvements thereon according to law.

(f) That there were no papers on file in the Gainesville Land Office in 1882, when Carew entered, giving any notice to him that the Government officers in the Public

Land Department had ever recognized, that Hackley had ever initiated a claim to the land, pursuant to and in compliance with any Act of Congress.

The above, though not all in so many words, were the facts found by the Secretary.

POINTS OF LAW.

1st. The Secretary found as a matter of law, or mixed law and fact, that Hackley's possession was not only not in accordance with any Act of Congress, but his entry was prohibited by law, so far as acquiring any inchoate or equitable right, and that in fact, he was a trespasser.

Plaintiffs do not claim there was any error of law in that finding, and there plainly was not, under the Act of 1807.

2d. That the Government had the lawful right; through its military officer, to take possession and appropriate the land to Government uses during the period of time from February, 1824, to 1882.

Plaintiffs do not contend there was any error of law in that finding.

3d. This being so, it necessarily follows that, when the land was abandoned for Government purposes, and was duly restored to the public domain, the legal title to the land and possession was in the United States. This plaintiffs do not deny this proposition.

4th. The legal title and possession thus being in the United States, in 1882, and having thus for the first time been surveyed, and the land being a part of the public domain, the Government, under the then existing laws, or under any new Act, like that of 1883, had the legal right to sell the land to the highest bidder or to any person having the capacity to comply and who should comply with the pre-emption laws or homestead laws. That Carew did comply with such homestead laws and was entitled to the patent.

It is in this fourth finding of law that plaintiffs

insist an error was committed to their prejudice. And their entire ground for relief is based on the above alleged error in law by the Secretary.

ARGUMENT.

1st. It must be conceded, and plaintiffs do concede, the universal rule to be, that the title to public land, being in the United States, no person can acquire an inchoate right to possession and subsequently the legal title save in a manner prescribed by Act of Congress.

2d. Plaintiffs necessarily concede, as a general rule, that the Government under an Act of Congress, can dispose and sell any of its lands, unless a claimant has acquired a vested right to have a title, under some prior Act of Congress, with which such claimant has complied.

3d. And we are thus brought to the pivotal point: Do plaintiffs, by their bill, clearly sustain their claim that the Secretary erred in deciding that plaintiffs, prior to 1882, have not acquired a vested right that barred the sale to Carew?

Plaintiffs' case rests entirely and exclusively upon this alleged error, which they must sustain or fail.

Their argument is based upon a line of fallacious reasoning.

They admit that, under the Act of 1807, their ancestor acquired no right, and that the marshal of a "military force" could and did lawfully remove him.

But plaintiffs base their case on the claim that the words in the Act of 1826, as follows, to-wit: "That any person * * * who * * * did on or before the first day of January, 1825, actually inhabit and cultivate a tract of land situated in the Territory of Florida, which tract is not rightfully (in 1826) claimed by any other person," etc., includes in its description their ancester Hackley and the land in question.

It is most reasonable that Congress by such Act did not intend to uproot public policy, and annihilate the power arising from public necessity, in peace or war, and

especially in time of war, to appropriate any of its land to public, civil or military uses, as against any person even in possession, who had not acquired the legal title or a vested right to have a legal title, conveyed by patent.

It is conceded that when this Act of 1826 was passed, Hackley had never acquired any right of possession, or any equitable right whatever. Whatever right he ever had, was conferred by that Act itself.

Now, we submit that it is absurdly unreasonable to conclude that by the Act of 1826, Congress intended to include land, which was then lawfully in possession of military forces, and had been lawfully appropriated to military uses, under pressure of military necessity.

Such a construction of the Act would prove too much.

It would establish that Congress intended to create in behalf of a prior occupant, contrary to law, a right to base an inchoate right to acquire a right to purchase land already appropriated to public uses; which right, to assert such inchoate right, could only be resorted to after the Government ceased to use the land, and had vacated the same.

This inchoate right to spring at once into existence, the moment the Government vacated, which might be 1,000 years, 100 years, and in this instance was 58 years, or might never be.

Military occupations of the frontiers, has repeatedly been the nucleus and cause of the building large towns and cities near by, under the protection of military forces. The history of the country furnishes numerous instances of this.

Military forces and civil officers make improvements on the land occupied, by building permanent and irremovable structures, like storehouses, officers' quarters, barracks, lighthouses, etc., and also cultivate the land itself. When in future such land is abandoned for public uses it has, by reason thereof and settlement of the adjacent lands, and the creation of towns and cities thereon, become very valuable. There being no vested right in another, the Government has the right as a part of its revenues, to

avail itself of such improved value, created by itself, and sell the same to the highest bidder. Such a right has often been exercised. This right in equity and law, is superior to any duty the Government owed to the heirs of one situated as Hackley was. In this instance, it is concluded, the Government owed no duty to Hackley, who was a trespasser, and whose only occupation of the land was that of a trespasser.

The Secretary decided that the Government had the right to sell this land thus improved, to the highest bidder.

That it did not do so, but sold it to a homesteader, at a smaller price, created no right in Hackley's heirs, nor could they complain of any more than of a sale at public outcry.

Thus we think it is demonstrated, that the land in question, being in the lawful possession of military forces, to continue indefinitely, was not embraced in the description of land intended by the Act of 1826. The Government having the legal right to appropriate the land to its uses, it is wholly immaterial whether or not the United States is included in the words: "which tract is not rightfully claimed by any other person." Considering the subject matter to be land, and the relation of the Government to it, it would not be a constrained construction to hold that the clause did embrace the military forces of the United States. Though soldiers, they were still persons

But it is a fundamental rule of construction that though the "letter killeth, the spirit liveth," and that which is implied is as much a part of the statute as if it had been written into it.

The Act should be construed and applied exactly as if, after the above quoted clause, the clause following had been added, to-wit: "or which has not been appropriated by the Government for public purposes."

This latter clause is as much a part of the statute as if written into the Act itself.

And this, for the reason that Congress and the Judicial Department of the Government, has from its

foundation held and frequently declared, that the Executive Department, by necessary implication, always has the power to appropriate to Government uses any lands in which no vested right has been acquired.

And when thus appropriated the land ceases to be a part of the public domain, in which no citizen, under any Act of Congress, can acquire even an inchoate right.

Plaintiffs concede this as a general rule. But by asseveration, not by reason, in this instance, assert that, by the Act of 1826, though the land was before then appropriated to public uses. Congress fastened one end of a chain around this land, and the other end around Hackley, and all his heirs were born with this chain around them, and the moment the Government ceased to use the land in 1882, such heirs, by a pull on the chain, could draw this land out of the public domain, and when they made that pull, they acquired a vested right which rendered the Government powerless to sell it to anybody else. And this upon an attenuated and refined use of words.

Undoubtedly, we think, the land embraced in the first section of the Act of 1826, was such land, either in the possession of the settler referred to in the Act, or was vacant, and unclaimed by any other; so that such settler could, or his grantee could, when a vested right was obtained, take possession and enjoy its use. Otherwise no benefits could accrue to the former settler, who was not in possession when the Act was passed.

If the land was occupied by the military forces, neither the settler nor his grantee could derive any benefit whatever by a construction to the contrary, except the indefinite, vague, intangible and invisible right at some future time that might never arrive, because, the Government might have in this case as in other cases, occupied the land for forts and military purposes forever.

We submit, therefore, that the Secretary did not err, as a matter of law, in holding that when the Executive Department in 1882, relinquished this land for military purposes, Hackley's heirs had no vested right, or any

better right to move thereon, and acquire title than had Carew.

The above is apart from all considerations that neither Hackley nor his legal representatives complied with the law of 1826 and that of 1813, made a part thereof.

In cases of this character, plaintiffs, before they can take the title from the patentee, they must make out a case free from any reasonable doubt.

The legal title will not be taken away while a reasonable doubt remains as to plaintiffs' right to it. This is fundamental.

H. BISBEE,
for Appellees.

Supreme Court of the United States.

No. 52.—October Term, 1904.

Sallie Field Scott, Eliza Madison Scott, Harriett B. Jones, et al., Appellants, *vs.* Lizzie W. Carew, W. W. Hampton, E. R. Gunby, et al.	Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

[January 3, 1905.]

On December 31, 1900, the plaintiffs, who are now appellants, filed their bill of complaint in the Circuit Court of the United States for the Southern District of Florida, praying a decree that the defendants, holding the legal title to a tract of land under patent from the United States, be decreed to hold that title in trust for them. A demurrer to the bill was sustained and a decree of dismissal entered. This was affirmed by the Circuit Court of Appeals for the Fifth Circuit, and from that affirmance this appeal was taken.

The averments in the bill are: The plaintiffs are the sole descendants and heirs at law of Robert J. Hackley, who died in 1845. In November, 1823, Hackley, then over twenty-one years of age, and the head of a family, settled upon and cultivated the tract in controversy. At that time the surrounding country was a dense wilderness and he the only settler. He erected on the tract a substantial dwelling and other buildings. In 1824 Colonel Brooke, with a detachment of United States troops, was sent to this portion of Florida, located a camp or cantonment on this tract, dispossessed Hackley, and took possession of the house and land so occupied and cultivated by him. The Secretary of the Interior, in the contest proceedings hereinafter referred to, in an opinion which is attached to the bill as an exhibit, found that this action was taken by order of the War Department. [redacted] United States troops continued to occupy the camp or cantonment until December 10, 1830, when by an executive order of the President the Fort Brooke military reservation was established, containing sixteen square miles of land and embracing the tract in controversy. Thereafter this military reservation was reduced from time to time by executive orders, until on June 1, 1878, only the tract in controversy, commonly known as the "Reduced Fort Brooke military reservation," remained. On January 4, 1883, it was relinquished, and transferred by the Secretary of War to the Interior Department. Hackley, after his removal from the tract, remained a resident of Florida up to the time of his death. On March 3, 1823, Con-

gress passed an act authorizing the President to establish a land office in each of the districts of East and West Florida as soon as in his opinion there was a sufficient quantity of public land surveyed to justify it. Under this act and by an executive order in 1828 a land office was established at St. Augustine, in the district in which this land was situate. At the time this office was established the hostility of the Indian tribes was such as to render communication between it and that portion of Florida where Hackley resided practically impossible. But in the year 1835, although the public surveys had not been extended into this part of Florida, Hackley filed with the register of the land office evidence designating the particular tract which had been settled upon, inhabited and cultivated by him as aforesaid, and claimed the right of pre-emption and purchase thereof under and by virtue of the act of Congress of April 22, 1826. By change of the boundary lines of the land districts of Florida the land subsequently came within the jurisdiction of the land office at Newnansville, Florida, whereupon on November 27, 1843, Hackley secured from the register of the land office at St. Augustine a copy of the evidence formerly filed in that office, and filed it with a notice of his claim with the register of the office at Newnansville. On September 26, 1887, the administrator of the estate of Hackley filed in the local land office a supplemental notice of the claim of the legal representatives of Hackley to the right of pre-emption in the purchase of the tract. Other parties made application to the Land Department for an entry of said lands, contest proceedings were had, which were terminated by a decision of the Secretary of the Interior adverse to the claim of the plaintiffs, and a patent was issued to Edmund S. Carew, under whom the defendants claim.

The following statutes are relied upon by the parties: Act of Congress, March 3, 1807, (2 Stat. 445,) section 1 of which provides:

"That if any person or persons shall, after the passing of this act, take possession of, or make a settlement on any lands ceded or secured to the United States, by any treaty made with a foreign nation, or by a cession from any State to the United States, which lands shall not have been previously sold, ceded, or leased by the United States, or the claim to which lands, by such person or persons, shall not have been previously recognized and confirmed by the United States; or if any person or persons shall cause such lands to be thus occupied, taken possession of, or settled; or shall survey, or attempt to survey, or cause to be surveyed, any such lands; or designate any boundaries thereon, by marking trees or otherwise, until thereto duly authorized by law; such offender or offenders, shall forfeit all his or their right, title, and claim, if any he hath, or they have, of whatsoever nature or kind the same shall or may be, to the lands aforesaid, which he or they shall have taken possession of, or settled, or cause to be occupied, taken possession of, or settled, or which he or they shall have surveyed, or attempted to survey, or cause to be surveyed, or the boundaries thereof he or they shall have designated, or cause to be designated, by marking trees or otherwise. And it shall moreover be lawful for the

President of the United States, to direct the marshal, or officer acting as marshal, in the manner hereinafter directed, and also to take such other measures, and to employ such military force as he may judge necessary and proper, to remove from lands ceded, or secured to the United States, by treaty, or cession as aforesaid, any person or persons who shall hereafter take possession of the same, or make, or attempt to make a settlement thereon, until thereunto authorized by law. And every right, title, or claim, forfeited under this act, shall be taken and deemed to be vested in the United States, without any other or further proceedings."

The other sections have no application to this case.

On February 5, 1813, (2 Stat. 797,) the following act was passed:

"That every person, or legal representative of every person, who has actually inhabited and cultivated a tract of land lying in either of the districts established for the sale of public lands, in the Illinois Territory, which tract is not rightfully claimed by any other person, and who shall not have removed from said Territory; every such person and his legal representatives shall be entitled to a preference in becoming the purchaser from the United States of such tract of land at private sale, at the same price and on the same terms and conditions in every respect as are or may be provided by law for the sale of other lands sold at private sale in said Territory, at the time of making such purchase: *Provided*, That no more than one-quarter section of land shall be sold to any one individual, in virtue of this act; and the same shall be bounded by the sectional and divisional lines run, or to be run, under the direction of the surveyor general for the division of the public lands: *Provided also*, That no lands reserved from sale by former acts, or lands which have been directed to be sold in town lots, and out lots, shall be sold under this act.

"SEC. 2. *And be it further enacted*, That every person claiming a preference in becoming the purchaser of a tract of land, in virtue of this act, shall make known his claim, by delivering a notice in writing to the register of the land office, for the district in which the land may lie, wherein he shall particularly designate the quarter section he claims; which notice the register shall file in his office, on receiving twenty-five cents from the person delivering the same. And in every case where it shall appear to the satisfaction of the register and receiver of public monies of the land office, that any person, who has delivered his notice of claim, is entitled, according to the provisions of this act, to a preference in becoming the purchaser of a quarter section of land, such person so entitled shall have a right to enter the same with the register of the land office, on producing his receipt from the receiver of public monies for at least one-twentieth part of the purchase money, as in case of other public lands sold at private sale: *Provided*, That all lands to be sold under this act shall be entered with the register, at least two weeks before the time of the commencement of the public sales, in the district wherein the land lies; and every person having a right of preference in becoming the purchaser of a tract of land, who shall fail so to make his entry with the register, within the time prescribed, his right shall be forfeited, and the land by him claimed shall be offered at public sale, with the other public lands in the district to which it belongs."

And on April 22, 1826, (4 Stat. 154,) Congress passed another act, the first section of which reads as follows:

"That every person, or the legal representatives of any person, who being either the head of a family, or twenty-one years of age, did on or before the first day of January, in the year one thousand eight hundred and twenty-five, actually inhabit and cultivate a tract of land situated in the Territory of Florida, which tract is not rightfully claimed by any other person, and who shall not have removed from the said Territory, shall be entitled to the right of pre-emption in the purchase thereof, under the same terms, restrictions, conditions, provisions and regulations, in every respect, as are directed by the act, entitled 'An act giving the right of pre-emption, in the purchase of lands, to certain settlers in the Illinois Territory,' passed February the fifth, one thousand eight hundred and thirteen: *Provided*, That no person shall be entitled to the provisions of this section who claims any tract of land in said Territory, by virtue of a confirmation of the commissioners, or by virtue of any act of Congress."

Mr. Justice BREWER delivered the opinion of the Court.

The vital question in this case is whether Hackley could claim the benefit of the act of 1826, in reference to the tract in controversy. Prior to that act he was wrongfully in possession of the tract, and could have been summarily removed by order of the President. (Act of March 3, 1807.) His dispossession was by authority of law. It was done in the exercise of the power vested in the President as Commander-in-Chief of the Army, the order of the War Department being presumed to be that of the President. The occupation of the tract by the United States troops was rightful, being an occupation of property of the Government by direction of the proper officer, and that rightful occupation continued until the act was passed. It is unnecessary to rest the case upon the clause in the act of 1826, "which tract is not rightfully claimed by any other person," although that is not without significance, or to discuss the question whether the United States can be considered another person. A more substantial reason is to be found in the rule that whenever a statute is passed containing a general provision for the disposal of public lands, it is, unless an intent to the contrary is clearly manifest by its terms, to be held inapplicable to lands which for some special public purpose have been in accordance with law taken full possession of by and are in the actual occupation of the Government. Where particular tracts have been taken possession of by rightful orders of an executive department, to be used for some public purpose, Congress in legislating will be presumed to have intended no interference with such possession nor a sale or disposal of the property to private individuals. Such has been the rule obtaining in the Land Department, as well as in the courts. An early case was *Wilcox* v. *Jackson*, 13 Pet. 498. That case rested upon a claim of right of pre-emption under the act of June 19, 1834, (4 Stat. 678,) which revived an act passed May 29, 1830, (4 Stat. 420,) containing these provisions:

"That no entry or sale of any land shall be made, under the provisions of this act, which shall have been reserved for the use of the United States, or either of the several States in which any of the public lands may be situated," or "which is reserved from sale by act of Congress, or by order of the President, or which may have been appropriated for any purpose whatsoever."

It appeared that at the request of the Secretary of War the Commissioner of the General Land Office had marked upon the official map of that department the tract in controversy as reserved for military purposes, and directed it to be withheld from sale. The court held that this action was that of the President, saying (p. 513):

"Now, although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian Affairs, including agencies, belong to the War Department. Hence we consider the act of the War Department in requiring this reservation to be made, as being in legal contemplation the act of the President; and, consequently, that the reservation thus made was in legal effect a reservation made by order of the President, within the terms of the act of Congress."

And going beyond the special language of the act in respect to the sale of lands, the court observed:

"But we go further, and say that, whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no reservation were made of it.

"The very act which we are now considering, will furnish an illustration of this proposition. Thus, in that act, there is expressly reserved from sale the land within that district, which had been granted to individuals and the State of Illinois. Now, suppose this reservation had not been made, either in the law, proclamation, or sale, could it be conceived that, if that land were sold at auction, the title of the purchaser would avail against the individuals or State to whom the previous grants had been made? If, as we suppose, this question must be answered in the negative, the same principle will apply to any land which, by authority of law, shall have been severed from the general mass."

In *Leavenworth &c. R. R. Company* v. *United States*, 92 U. S. 733, 745, the doctrine announced in *Wilcox* v. *Jackson*, *supra*, was reaffirmed, the court, quoting the first paragraph in the last quotation, added, "it may be urged that it was not necessary in deciding that case to pass upon the question; but, however this may be, the principle asserted is sound and reasonable, and we accept it as a rule of construction." In that case it was held that a grant of public lands in aid of a railroad did not apply to lands included within an Indian reservation, and that it was immaterial that

the reservation was afterwards set aside and the lands had become a part of the public lands of the nation. *Newhall* v. *Sanger*, Id. 761, ruled that lands within the boundaries of an alleged Mexican or Spanish grant which was *sub judice* at the time the Secretary of the Interior ordered a withdrawal of lands along the route of the road, were not embraced by a grant to a railroad company, and it was said in the opinion (p. 763) "the words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

In *Shively* v. *Bowlby*, 152 U. S. 1, it was held that while Congress has power to grant lands below high-water mark in navigable waters, yet the fact that the public surveys are made to terminate on the banks or shores of those waters, indicates that such lands are not subject to entry and sale under the general land laws, but so far as they are situated in a territory are reserved for the use and control of the future state. This doctrine was reaffirmed in *Mann* v. *Tacoma Land Company*, 153 U. S. 273. Many authorities might be cited to the proposition that a prior appropriation is always understood to except lands from the scope of a subsequent grant, although no reference is made in the latter to the former. See *Lake Superior &c. Company* v. *Cunningham*, 155 U. S. 354, 373.

There is nothing in *United States* v. *Fitzgerald*, 15 Pet. 407, to conflict with the foregoing views. It merely decided that an officer of the United States (in that case an inspector of customs) was not deprived by any act of Congress of the benefit of the pre-emption laws, and the fact that he was put in possession of a tract of land by the collector of customs, who had received no instructions to that effect from the Treasury Department, was not an appropriation to the uses of the Government. It is true a letter from the Acting Commissioner of the General Land Office to the register at New Orleans, stating that the Secretary of the Treasury had directed that the tract be reserved from sale for the use of the custom house at New Orleans, and requesting the register to note upon his plats that it was so reserved from sale, was in evidence, but this was written two years after the inspector had entered and paid for the land. Of course, such attempted reservation could have no effect upon a title acquired by the entryman prior thereto. Nor is there any conflict in *United States* v. *Tichenor*, 12 Fed. Rep. 415. There it appeared that the commanding officer of United States troops in Oregon ordered that a military reservation be established on the tract in controversy. In obedience thereto a lieutenant erected some buildings thereon for the use of the soldiers. It was held by the Circuit Court that such action constituted no appropriation of the land so as to exempt it from the operation of the general land laws. But the ground of the decision was that the general commanding was acting without any direction from the President or the War Department, the court saying, (p. 423):

"It may be admitted, as suggested in *Wilcox* v. *Jackson*, 13 Pet. 513, that if the order directing the reservation to be made had been issued by the Secretary of War—the head of the Department through whom the President would speak and act upon the subject—in the absence of evidence to the contrary, it would be presumed that he acted by the direction of the President.

"But neither General Hitchcock nor Lieutenant Wyman had any authority to designate or establish a reservation at Port Orford for any purpose. It is not alleged that they were acting in the premises under the authority of the President, and there is no presumption of law that they were."

Again it is urged that the establishment of this camp or cantonment was a mere temporary matter, and not to be considered as in the nature of a reservation or appropriation, and we are referred to orders and other papers found in the records of the War Department, copies of which appear in the brief of appellants' counsel. Those orders, if we are permitted to consider them on this demurrer, make distinctly against the contentions of counsel. We quote from that issued from the Adjutant General's office:

"Order 70.

"Brevet Col. Brooke, with four companies of the Fourth Infantry, will proceed with as little delay as practicable to Tampa Bay, East Florida, where he will establish a military post. He will select a position with a view to the health and in reference to the Florida Indians about to be removed to that vicinity agreeable to the late treaty. Upon this point he will consult Col. Gadsden, the commissioner employed in locating the Indians. . . .

"The permanent headquarters of the Fourth Infantry will remain at Cantonment Clinch, and, should Col. Clinch have rejoined his regiment, on the receipt of this order he will be charged with the duty of preparing Col Brooke's command for the expedition to Tampa.

"By order of Major Gen. Brown.

"E. KIRBY, *Aid-de-Camp.*"

It will be seen that the direction is to "establish a military post." It was for this "post" that the tract in controversy was taken, and the statement in the report of Colonel Brooke, as one of the reasons for its selection, that some two miles in the rear of the place a ridge of piney lands commences, to which the troops could retire with their tents on the slightest manifestation of disease, does not alter the fact that this tract was selected for the "post." The further fact that permanent headquarters of the Fourth Infantry were to remain at Cantonment Clinch, is entirely consistent with the direction to Colonel Brooke to proceed with four companies to Tampa Bay and there establish this military post. The judgment of the War Department, whose action is presumed to be the action of the President, was that, having reference to the Florida Indians who were about to be removed to that vicinity, it was important to have a military post established. Its permanence would depend largely on the developments

of the future. It remained a military post for half a century, and a very large tract was in 1830 set apart for a surrounding reservation. True, it has since been all abandoned, but although it may have been within the contemplation of the authorities that a time would come when the necessity for this military post would cease, it was none the less for the time being a post established by the proper department of the Government. It was until the post was abandoned an appropriation of the land for military purposes. Quite a number of reservations and posts in our Western territory once established have afterwards been abandoned, but while so appropriated they are excepted from the operation of the public land laws, and no right of an individual settler attaches to or hangs over the land to interfere with such action as the Government may thereafter see fit to take in respect to it. No cloud can be cast upon the title of the Government—nothing done by an individual to embarrass it in the future disposition of the land.

Without considering, therefore, the question of laches or limitation we are of opinion that the decision of the Court of Appeals was correct, and it is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.